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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1,083.

THE UNION PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 18, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 1,083.

THE UNION PACIFIC RAILROAD COMPANY,
APPELLANT,

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1 United States Court of Claims.

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES OF AMERICA.

No. 11,966.
Filed November 25, 1878.

I.—*Petition.*

To the Honorable the Judges of the Court of Claims:

Your petitioner, the Union Pacific Railroad Company, respectfully represents—

That it is a corporation duly organized under the laws of the United States.

That in and by an act of Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the several acts amendatory thereof, approved July 2, 1864, March 3, 1865, and July 3, 1866, certain rights, powers, donations, grants of land and bonds, rights of way, privileges, and franchises were given and granted to the Union Pacific Railroad Company, for the purpose of aiding the said company in the construction of its railroad and telegraph line, and that the said acts were duly accepted, and its said railroad and telegraph line were duly constructed in conformity therewith by your petitioner.

2 That under and in pursuance of said acts of Congress, United States bonds, payable at thirty years from their date, bearing interest at six per cent. per annum, payable by the government semi-annually in lawful money of the United States, were issued in aid of the construction of said railroad, which bonds and interest thereon are not yet due. That the grants aforesaid were made upon condition that said company should pay said bonds at maturity, and should keep said railroad and telegraph line in repair and use, and should at all times transmit dispatches over said telegraph line and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service.

That under and in pursuance of the fifth section of the act of Congress approved July 2, 1864, amending the act of Congress of July 1, 1862, above referred to, and the act of Congress approved March 3, 1871, one-half of the amount that might become due to your petitioner for the carriage and transportation of the mails, troops, and munitions of war, supplies, and public stores for the

United States government over the railroad of your petitioner, was to be applied to the payment of the bonds issued by the government in aid of the construction of said road; and that the remaining half of said amount was to be paid to your petitioner in money, and not to be withheld or applied to the payment of said bonds or the interest thereon.

That your petitioner has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

3 Your petitioner further says, that during the month of July, A. D. 1878, upon the request of the United States, made through its officers thereunto duly authorized, your petitioner transported troops of the United States, over its said road, and became, in virtue of the said service so rendered, entitled to compensation therefor at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service.

Your petitioner avers, that the amount and value of the said service so rendered by your petitioner in transporting troops over petitioner's said road during the said month of July, 1878, amounted in the aggregate to the sum of ten thousand four hundred and fifty-one dollars and seventy-three cents ($10,451.73).

That your petitioner further avers, that petitioner duly presented its account and vouchers, showing the rendition of the said service, to the proper accounting officers of the government of the United States, and the same was duly allowed by the United States, and a warrant was issued therefor.

Your petitioner avers, that, by reason of all the premises aforesaid, your petitioner became entitled to be paid upon and after the allowance of the said claim as aforesaid of ten thousand four hundred and fifty-one dollars and seventy-three cents ($10,451.73), the one-half thereof, viz., the sum of five thousand two hundred and twenty-five dollars and eighty-six cents, and to have the remaining half thereof credited and applied by the government of the United States to the payment of the bonds issued by the government in aid of the construction of the road of your petitioners as above stated, under and by virtue of the provisions of the acts aforesaid, and especially of the provisions of the fifth section of the said act of the 2d of July, 1864, (13 Stats. at Large, pp. 358, 359,) which provides "That only one-half of the compensation for services rendered for the government by the said company shall be

4 required to be applied to the payment of bonds issued by the government in aid of the construction of said roads."

Your petitioner further avers, that your petitioner, before, at, and immediately after the allowance of the said claim by the government of the United States as one owing to your petitioner as aforesaid, and admitting it to be due, duly demanded the payment of the

said one-half so owing for said services unto your petitioner, and then and there protested against any other application of the said half so payable to your petitioner to any other purpose than payment to petitioner as aforesaid.

Your petitioner says, that notwithstanding all the premises aforesaid, the defendant hath wholly neglected and refused to pay, and has not paid, to your petitioner the said sum of five thousand two hundred and twenty-five dollars and eighty-six cents ($5,225.86), or any part thereof, although, as petitioner avers, the said money was duly appropriated and remaining in the treasury applicable to the payment thereof.

No other action has been had by any of the executive departments on the allowance of this claim, except as hereinabove set forth. That your petitioner is the sole owner thereof, and no assignment or transfer of the same, or any part thereof, or any interest therein, has ever been made.

The claimant is a citizen of the United States.

Your petitioner alleges, that there is due and owing to petitioner, in the premises above set forth, the just and full sum of five thousand two hundred and twenty-five dollars and eighty-six cents, after allowing all just credits and offsets.

Your petitioner, therefore, respectfully prays this honorable court to render judgment in favor of your petitioner, and against the United States, as follows:

First. That the United States be decreed to pay to your petitioner one-half part of the amount so earned by it for
5 the services so performed for the government as hereinabove stated in the month of July, 1878, amounting to the said sum so allowed by the United States through its proper accounting officers, to wit, the full sum of ten thousand four hundred and fifty-one dollars and seventy-three cents ($10,451.73), said one-half so prayed to be paid to your petitioner under the decree of this court, being the said sum of five thousand two hundred and twenty-five dollars and eighty-six cents ($5,225.86).

Second. That the United States give to your petitioner credit on account of the bonds so issued by it to your petitioner for the remaining one-half part of the amount of its said claim, which said half part amounts as aforesaid to the said sum of five thousand two hundred and twenty-five dollars and eighty-six cents ($5,225.86).

Your petitioner prays for such other and further relief in the premises as may be equitable and just; and will ever pray, &c.

(Signed,) THE UNION PACIFIC R. R. CO., *Petitioner.*
By SIDNEY DILLON, *President.*

SHELLABARGER & WILSON,
Attorneys for Petitioner.

Post-office address of Sidney Dillon, President, is No. 23 Nassau street, New York city, N. Y.

Post-Office address of Shellabarger & Wilson: Washington city, D. C.

STATE, COUNTY, AND CITY OF NEW YORK, } ss.
SOUTHERN DISTRICT OF NEW YORK. }

Sidney Dillon, being duly sworn, deposeth and saith: That he is the president of the Union Pacific Railroad Company, the petitioner in the foregoing petition named; that no assignment or transfer of the claim set forth in the said petition, or any part thereof, or any interest therein, has been made at any time; that said petitioner is justly entitled to the amounts in said petition claimed from the United States, after allowing all just credits
6 and offsets, and that he believes the facts as stated in the said petition are true; and further deponent saith not.

SIDNEY DILLON.

Sworn to before me this 23d day of November, A. D. 1878.—W. R. Spooner, Notary Public, (196,) New York city and county.

STATE OF NEW YORK, } ss.
CITY AND COUNTY OF NEW YORK. }

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that W. R. Spooner, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said state, and for general purposes; and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court and county, the 23d day of November, 1878.

[SEAL.] HENRY A. GUMBLETON, *Clerk.*

7 II.—*Traverse filed Dec.* 5, 1878.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the

said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Asst. Atty-General.

8 III.—*Findings asked by the parties and their stipulation that the same may be found by the court.*

The parties considering the following facts, hereinafter set forth, to be proven and deeming them material to the due presentation of this case in the findings of facts, request the court to find the same as follows:

1. That during the month of July, A. D. 1878, the claimant, at the request of the defendant, transported troops of the United States over the claimant's road, as averred in the petition.

2. That the amount and value of said service so rendered by the claimant for the defendant, as stated in proposition first, was and is the sum of ten thousand four hundred and fifty-one dollars and seventy-three cents, the same being fair and reasonable compensation for said service and not exceeding the amounts paid by private parties for the same kind of service.

9 3. That said amount was duly allowed and audited by the accounting officers of the treasury for the said service, on the eighth day of October, A. D. 1878.

4. That on the twenty-eighth day of October, A. D. 1878, the claimant demanded of the defendant the one-half of the said sum, to wit, five thousand two hundred and twenty-five dollars and sixty-eight and a half cents ($5,225.68½), and protested against the payment of said one-half into any sinking fund, or its application to the payment of bonds issued by the United States to said company, or to the interest thereon, and against the retention of said one-half by the United States on any account whatever.

5. That on the fourth day of November, A. D. 1878, the proper officers of the Treasury Department of the United States issued a warrant No. 5,950, for the said amount of ten thousand four
10 hundred and fifty-one dollars and seventy-three cents ($10,451.73) on account of the transportation aforesaid.

6. That on the fifth day of November, A. D. 1878, the Secretary of the Treasury refused to pay the said one-half to the claimant, giving as his reason therefor that the same was required by an act of Congress, approved May seventh, A. D. 1878, hereinafter referred to, to be turned into a sinking fund, as provided in said act.

7. That on November 6, 1878, a draft to the order of Secretary of the Treasury, assignee of Union Pacific Railroad Company, for $10,451.13, was issued. That the Secretary of the Treasury made the following endorsement on the draft:

"Pay to the Treasurer of the United States, to be by him deposited in the United States Treasury, in general account, on ac-

count of moneys received from the Union Pacific Railroad Company, being the compensation found due it for transporta-
11 tion performed for the War Department in July, 1878, and withheld in accordance with the provisions of sec. 2, act May 7, 1878, as follows:

One-half, $5,225.86, on account of reimbursement of interest paid on bonds issued to the Union Pacific Railroad Company.

Credit to be given under date of August —, and one-half, $5,-225.87, on account sinking fund, Union Pacific Railroad Company, to be carried to credit under sec. 4 of the above act.

JOHN SHERMAN,
Secretary of the Treasury, Assee. Union Pacific Railroad."

And the Assistant Treasurer of the United States endorsed the same.

8. That the Assistant Treasurer of the United States issued a certificate of deposit, showing that ten thousand four hundred and fifty-one $\frac{13}{100}$ dollars on account of moneys received from
12 the Union Pacific Railroad Company, being compensation found due it for transportation performed in July, 1878, and withheld, etc., have been deposited in the treasury.

9. That revenue covering warrants were issued, showing the moneys before mentioned have been covered into the treasury, one-half, viz., $5,225.86, on account of reimbursement of interest, and one-half, viz., $5,225.87, on account of sinking fund.

10. That the Secretary of the Treasury directed the Treasurer of the United States, to purchase at the end of each month, five-per-centum bonds of the United States to the amount of the moneys withheld from the Union and Central Pacific Railroad Companies since July 1, 1878, and apply the same to the credit of the company from which the money may have been withheld, the bonds to be registered in the name of the Treasurer of the United States.

In a schedule annexed the sum of $5,225.87 appears as hav-
13 ing been withheld on this account.

11. That the Treasurer of the United States, in accordance with the directions above recited, purchased bonds of the funded loan of 1881, for account of the sinking fund, Union Pacific Railroad Company, to a large amount.

12. That an appropriation warrant was issued on account of sinking fund, Union Pacific Railroad Company, for the amount expended by the Treasurer of the United States in the purchase of five-per-centum bonds as before recited, and there was included in the amount appropriated the sum of $5,225.87, which had been deposited and covered into the treasury as shown in the other findings.

13. That the claimant never assigned or in any way parted with the claim sued for; but the issuing of said warrant mentioned in finding No. 5, in favor of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, and the issuing

14 of the draft on said warrant, as found in finding No. 7, payable to the order of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, was each the act of the defendant done without the consent of the claimant; and the said warrant and draft were issued in that form for the purpose of enabling the proper officers of the Treasury Department to place the said money in the treasury, as found in the preceding findings.

14. That the said amount placed to the credit of the sinking fund, to wit, the sum of $5,225.87, as hereinbefore found, is the one-half of the money earned by the claimant, as found in the above findings, Nos. 1 and 2, and for which half this action is prosecuted.

SHELLABARGER AND WILSON,
For Claimant.
JOS. K. McCAMMON,
For the United States.

15 WASHINGTON CITY, D. C., *February* 14, 1879.

It is hereby stipulated and agreed by and beween the claimant and defendant that the foregoing propositions constitute the facts in this case, and that the same may be found to be such by the court.

SHELLABARGER AND WILSON,
For Claimant.
JOS. K. McCAMMON,
For the United States.

Conclusion of Law.

Upon the foregoing facts, the conclusion of law is that the claimant's petition be dismissed.

16 IV.—*Final Judgment by the Court.*

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES. } No. 11,966.

Mr. Shellabarger, for the claimant, and Mr. McCammon, for the defendants, filed an agreed statement of facts herein and submitted the case upon it, and it was thereupon ordered that judgment be entered as follows:

The court, upon due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant be dismissed.

17 V.—*Application for and allowance of an Appeal.*

From the judgment rendered in the above-entitled cause on the 17th day of February, A. D. 1879, in favor of the defendants, the

claimant, by its attorneys, Shellabarger and Wilson, on the 17th day of February, 1879, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

SHELLABARGER & WILSON,
Att'ys for Claimant.

Filed Feb. 17, 1879.

Ordered, That the appeal be allowed as prayed for.

February 17, 1879.

18 In the Court of Claims.

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES. } No. 11,966.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the judgment of the court, of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order of the court allowing the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this day of February, 1879.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Endorsed on cover:) Court of Claims. No. 1,083. The Union Pacific Railroad Company, Appellant, vs. The United States. Filed 18th February, 1879.

IN THE

Supreme Court of the United States

No. 1,083.

UNION PACIFIC RAILROAD COMPANY, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR

THE UNION PACIFIC RAILROAD COMPANY,

By SHELLABARGER & WILSON,

Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 1,083.

UNION PACIFIC RAILROAD CO., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

The record in this case presents to this court, on appeal, but one question, namely: Whether the act of Congress approved May 7, 1878, known as "the funding act," (20 Statutes, 56,) furnishes a defense against the recovery of the moneys sued for, the defendant admitting, in the agreed facts of record, the liability, unless such liability is avoided by the fact that said moneys have been placed in the sinking fund agreeably to the provisions of said act?

STATUTES.

For the purposes of convenient reference, we here insert such sections of the statutes as will be brought into view.

The said funding act is as follows:

AN ACT to alter and amend the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and also to alter and amend the act

of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act.

Whereas, on the first day of July, anno Domini eighteen hundred and sixty-two, Congress passed an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes"; and

Whereas afterward, on the second day of July, anno Domini eighteen hundred and sixty-four, Congress passed an act in amendment of said first-mentioned act; and

Whereas the Union Pacific Railroad Company, named in said acts, and under the authority thereof, undertook to construct a railway, after the passage thereof, over some part of the line mentioned in said acts; and

Whereas, under the authority of the said two acts, the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, undertook to construct a railway, after the passage of said acts, over some part of the line mentioned in said acts; and

Whereas the United States, upon demand of said Central Pacific Railroad Company, have heretofore issued, by way of loan and as provided in said acts, to and for the benefit of said company, in aid of the purposes named in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half yearly, to the amount of twenty-five million eight hundred and eighty-five thousand one hundred and twenty dollars, which said bonds have been sold in the market or otherwise disposed of by said company; and

Whereas the said Central Pacific Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas, after the passage of said acts, the Western Pacific Railroad Company, a corporation then existing under the laws of California, did, under the authority of Congress, become the assignee of the rights, duties, and

obligations of the said Central Pacific Railroad Company, as provided in the act of Congress passed on the third of March, anno Domini eighteen hundred and sixty-five, and did, under the authority of the said act and of the acts aforesaid, construct a railroad from the city of San Jose to the city of Sacramento, in California, and did demand and receive from the United States the sum of one million nine hundred and seventy thousand five hundred and sixty dollars of the bonds of the United States, of the description before mentioned as issued to the Central Pacific Company, and in the same manner and under the provisions of said acts; and upon and in respect of the bonds so issued to both said companies, the United States have paid interest to the sum of more than thirteen and a half million dollars, which has not been reimbursed; and

Whereas said Western Pacific Railroad Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States to it, and secured the same by mortgage, which are, if lawfully issued and disposed of, a prior and paramount lien to that of the United States, as stated, and secured thereby; and

Whereas said Western Pacific Railroad Company has since become merged in, and consolidated with, said Central Pacific Railroad Company, under the name of the Central Pacific Railroad Company, whereby the said Central Pacific Railroad Company has become liable to all the burdens, duties, and obligations before resting upon said Western Pacific Railroad Company; and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company; and

Whereas the United States, upon the demand of the said Union Pacific Railroad Company, have heretofore issued by way of loan to it and as provided in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half yearly, the principal sums of which amount to twenty-seven million two hundred and thirty-six thousand five hundred and twelve dollars; on which the United States have paid over ten million dollars interest over and above all reimbursements; which said bonds have been sold in the market or otherwise disposed of by said corporation; and

Whereas said corporation has issued and disposed of an

amount of its own bonds equal to the amounts so issued to it by the United States as aforesaid, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas the total liabilities (exclusive of interest to accrue) to all creditors, including the United States, of the said Central Pacific Company, amount in the aggregate to more than ninety-six million dollars, and those of the said Union Pacific Railroad Company to more than eighty-eight million dollars; and

Whereas the United States, in view of the indebtedness and operations of said several railroad companies respectively, and of the disposition of their respective incomes, are not and cannot, without further legislation, be secure in their interests in and concerning said respective railroads and corporations, either as mentioned in said acts or otherwise; and

Whereas a due regard to the rights of said several companies respectively, as mentioned in said act of eighteen hundred and sixty-two, as well as just security to the United States in the premises, and in respect of all the matters set forth in said act, require that the said act of eighteen hundred and sixty-two be altered and amended as hereinafter enacted; and

Whereas, by reason of the premises also, as well as for other causes of public good and justice, the powers provided and reserved in said act of eighteen hundred and sixty-four for the amendment and alteration thereof ought also to be exercised as hereinafter enacted: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respect-

ively for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the thirtieth day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of the United States or of either of said railroad companies existing prior thereto.

SEC. 2. That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided, for the uses therein mentioned.

SEC. 3. That there shall be established in the Treasury of the United States a sinking fund, which shall be invested by the Secretary of the Treasury in bonds of the United States; and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as hereinafter mentioned. And in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless, for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to invest in other bonds of the United States. All the bonds belonging to said fund shall, as fast as they shall be obtained, be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders than the Secretary of the Treasury until they shall have been indorsed by him, and publicly disposed of pursuant to this act.

SEC. 4. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the government by said Central Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit

of said sinking fund, the sum of one million two hundred thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking fund, the sum of eight hundred and fifty thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding.

SEC. 5. That whenever it shall be made satisfactorily to appear to the Secretary of the Treasury, by either of said companies, that seventy-five per centum of its net earnings as hereinbefore defined, for any current year are or were insufficient to pay the interest for such year upon the obligations of such company, in respect of which obligations there may exist a lien paramount to that of the United States, and that such interest has been paid out of such net earnings, said Secretary is hereby authorized, and it is made his duty, to remit for such current year so much of the twenty-five per centum of net earnings required to be paid into the sinking fund, as aforesaid, as may have been thus applied and used in the payment of interest as aforesaid.

SEC. 6. That no dividend shall be voted, made, or paid

for or to any stockholder or stockholders in either of said companies respectively at any time when the said company shall be in default in respect of the payment either of the sums required as aforesaid to be paid into said sinking fund, or in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon any debt the lien of which, or of the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of any of said companies who shall receive any such dividend contrary to the provisions of this act, shall be liable to the United States for the amount thereof, which, when recovered, shall be paid into said sinking fund. And every such officer, person, or stockholder who shall knowingly vote, declare, make, or pay any such dividend contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not exceeding one year.

SEC. 7. That the said sinking fund so established and accumulated shall, at the maturity of said bonds so respectively issued by the United States, be applied to the payment and satisfaction thereof, according to the interest and proportion of each of said companies in said fund, and of all interest paid by the United States thereon, and not reimbursed, subject to the provisions of the next section.

SEC. 8. That said sinking fund so established and accumulated shall, according to the interest and proportion of said companies respectively therein, be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such companies respectively, lawfully paramount to the rights of the United States, and for the claims of other creditors, if any, lawfully chargeable upon the funds so required to be paid into said sinking fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity, to the end that all persons having any claim upon said sinking fund may be entitled thereto in due order; but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage, lien, or other creditor of any of said companies respectively, nor to excuse any of said companies respectively from the duty of dis-

charging, out of other funds, its debts to any creditor except the United States.

SEC. 9. That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or into the Treasury, or into said sinking fund under this act, or under the acts hereinbefore referred to, or otherwise, are hereby declared to be a lien upon all the property, estate, rights, and franchises of every description granted or conveyed by the United States to any of said companies respectively or jointly, and also upon all the estate and property, real, personal, and mixed, assets, and income of the said several railroad companies respectively, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But this section shall not be construed to prevent said companies respectively from using and disposing of any of their property or assets in the ordinary, proper, and lawful course of their current business, in good faith and for valuable consideration.

SEC. 10. That it is hereby made the duty of the Attorney-General of the United States to enforce, by proper proceeding against the said several railroad companies respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to.

SEC. 11. That if either of said railroad companies shall fail to perform all and singular the requirements of this act and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants, and franchises derived or ob-

tained by it from the United States; and it shall be the duty of the Attorney-General to cause such forfeiture to be judicially enforced.

SEC. 12. That nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal, as, in the opinion of Congress, justice or the public welfare may require. And nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in favor of the United States.

SEC. 13. That each and every of the provisions in this act contained shall severally and respectively be deemed, taken, and held as in alteration and amendment of said act of eighteen hundred and sixty-two and of said act of eighteen hundred and sixty-four respectively, and of both said acts.

Approved May 7, 1878.

The sections and parts of sections of the acts of Congress of July 1, 1862, (12 Stats., 489,) and of 2d July, 1864, (13 Stats., 356,) which principally affect the present case, are as follows:

SECTIONS OF PACIFIC RAILROAD ACTS ABOVE REFERRED TO.

First.—Sections of the act of July 1, 1862.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company [Union Pacific] for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the oper-

ation of this act, and required for the said right of way and grants hereinafter made. (12 Stats., 491.)

SEC. 3. (As amended by section 4 of act of July 2, 1864.) *And be it further enacted*, That there be, and is hereby, granted to the said company [Union Pacific] for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *ten* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *twenty* miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company. (12 Stats., 492, and 13 Stats., 358.)

SEC. 4. (As amended by section 6, act of 1864.) *And be it further enacted*, That whenever said company shall have completed *twenty* consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report in relation thereto; and if it shall appear to him that *twenty* consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is com-

pleted, to the amount aforesaid; and patents shall in like manner issue as each *twenty* miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners, by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such *twenty* miles have been completed, in the manner required by this act, and setting forth with certainty the points where such *twenty* miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC. 5. *And be it further enacted*, That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of *forty* [afterwards, by act of 1864, reduced to *twenty*] consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of *sixteen* of said bonds per mile for each section of forty [twenty] miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said

default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company [Union Pacific] shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and *all* [by act of 1864 reduced to half] *compensation* for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 9. *And be it further enacted*, That * * * the Central Pacific Railroad Company of California, *a corporation existing under the laws of the State of California*, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, *upon the same terms and conditions, in all respects*, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California. *Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.*

SEC. 10. *And be it further enacted*, That * * * the Central Pacific Railroad Company of California, after com-

pleting its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky mountains and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued in the construction thereof shall be *treble* the number per mile hereinbefore provided; and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each the bonds to be issued to aid in the construction thereof shall be *double* the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expendi-

tures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling-stock, machine-shops, lands, tenements and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States. * * *

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph—including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running, and managing of said road—shall exceed ten per centum upon its cost, (exclusive of the five per centum to be paid to the United States,) Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. *And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said companies named herein,* ADD TO, ALTER, AMEND, OR REPEAL THIS ACT. (12 Stats., p. 492.)

SECTIONS OF THE ACT OF 1864.

SEC. 5. *And be it further enacted*, That * * * , and that *only one-half* of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

SEC. 10. *And be it further enacted*, That section five of said act [act of July 1, 1862] be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road,

may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the government of the United States. * * *

SEC. 22. *And be it further enacted*, That *Congress may at any time alter, amend, or repeal* THIS ACT. (13 Stats., 358.)

BRIEF.

It will be observed, by an inspection of the foregoing, that there is but a single question in the case, which is, whether moneys confessed by the defendant to have been earned by the claimant, by transportation, since the funding act took effect,—and to be owing and now payable to claimant according to that provision of section 5 of the act of 1864 (13 Stats., 359) which says: "Only one-half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads,"—can be now lawfully ordered, by the act of Congress of 7th June, 1878, to be "retained by the United States" and "carried to the credit of a sinking fund," as provided in said act, for the payment of said bonds and interest, such bonds and interest not being due, and the claimant not being claimed to be in any default, in respect of any obligation to the United States, or to be insolvent.

STATEMENT OF FACTS.

The facts are briefly as follows:

1. The Union Pacific Railroad Company, claimant, during the month of July, 1878, transported troops for the United States, defendant, the value of which service was the sum of $10,451.73. (See Record, p. 5, findings 1, 2, and 3.)

2. After the accounts had been regularly passed upon and allowed by the proper accounting officers, finding the above amount due, and before the money had been placed in a sinking-fund, as hereinafter stated, the claimant demanded the payment by the United States of the one-half of the said amount, viz., $5,225.86, and protested against placing the same or any part thereof in any sinking fund, or the application thereof to the payment of principal or interest on bonds issued by the United States to said Company. (See Record, p. 5, finding 4.)

3. The Secretary of the Treasury refused to pay said company said sum of $5,225.86, and against said protest placed the same in a sinking-fund, pursuant to the act approved May 7, 1878, commonly known as the Thurman Bill, or Sinking-Fund Act. (See Record, p. 5, findings 6 to 14, inclusive.)

Assignment of Errors.

1. The court erred in rendering judgment for defendant, appellee.

2. The court erred in holding valid the provisions of said act of Congress, requiring the money so found due claimant to be placed to the credit of said sinking-fund.

3. The court erred in refusing judgment in favor of claimant, appellant, for the said sum of $5,225.86.

ment of the Interior, within one year after the passage of this act." (12 Stats., 493.) So that, before the loan could be made, the lender required that a complete corporate person should exist, with whom a contract of loaning could be agreed on by the lender; and such person capable of agreeing upon the terms of the loan did exist before the loan was in fact made.

II. The claimant at the date of this loan was not merely a person capable of making a contract with the defendant fixing the terms of the loan, but "was not (to here adopt the words of this court in the late case, unreported, which, for the sake of identifying it, we shall denominate "the Credit Mobilier case") "a mere creature of the United States; but while it owes duties to the government, which may in a proper case be enforced, it is still a private corporation, the same as any other railroad company"; and as such private corporation the said "railroad and telegraph line are neither in whole nor in part the property of the government, but the ownership is in the claimant, a private corporation." (18 Wall., 32.) Hence, any property held by the claimant in the terms of this contract of loan is the private property of this private corporation.

III. This private property of this private corporation, whether held in the terms of this contract of loan or in aught else, is not subject to any outstanding trust in, or in favor of, the United States, in virtue of which the United States can assert, by suit or act of Congress, any trust dominion whatever over such property, or deal with the terms of this loan otherwise than as any ordinary loan.

This exact proposition is also expressly ruled in the said Credit Mobilier case, and need not be here further enforced.

IV. Our next, and a vital proposition, we prefer to state in the words of this court, as found in the case last cited.

"The government sustains two distinct relations to this railroad company, and it is important, in considering her rights, * * * to keep them separate. The company is organized under an act of Congress. It owes its corporate existence to that act, and the government has all the rights which belong to any other government as a sovereign and legislative power over this creature of that power. That this power should not be too much crippled by the doctrine that a charter is a contract, the eighteenth section declares that Congress may at any time, having due regard for the rights of the companies named therein, add to, alter, amend, or repeal the act. The power of Congress, therefore, in its sovereign and legislative capacity over this corporation, is very great."

"The government, however, holds *another* and very important relation to the company, namely, the relation of *contract*. It has loaned the company twenty-seven millions of dollars"; and the court then proceeds to state the other "*contract*," as distinguished from the *charter* or *legislative* relations of the government to this company, and concludes that since no money is due the government (citing 91 U. S. R., 72) under this contract relation of lender, therefore "there is no ground of relief on account of money due by the defendant to the plaintiff."

Our fourth proposition is, therefore, repeated in our own words, thus:

These two acts of Congress, taken as one, (1 Otto, 350,) contain two distinct elements bearing on this point: one, the tender of an act of incorporation or charter, as to which the government retains and holds all the reserved power of legislation fairly implied by the reservation of the power to add to, alter, amend, or repeal said act, this reservation being, however, taken in connection with the constitutional limitations imposed upon all governments protective of private property, and also in connection with the restric-

tion on the power of amendment contained in the acts; the other, that they tender to the companies named contracts distinct from the charter, which, when accepted under the seal of the company, became valid and binding executory contracts, private and commercial in their nature, and when performed on the part of the company by the completion of the road and telegraph line, and the due performance of the service stipulated for, became executed contracts, vesting *property* rights, coming under the protection of the constitutional limitations which protect all "property"; and the reserved power to add to, alter, amend, and repeal has no application to this contract relation so established between the government and this company.

Within the scope of this commercial contract, so distinct from the charter, are embraced those stipulations which, on the one side, grant lands, rights of way, or a loan on stipulated terms and time, and the like; and which stipulate, on the other side, to pay said bonds at maturity, make said road and telegraph line before the day named, keep the same in repair, transmit dispatches, and do the government transportation as provided in the act, and pay annually on said bonds the half of the government transportation and five per cent. of the net earnings, as stipulated in the acts, and also the provisions of said acts in regard to the mortgages securing the loans provided for, and fixing priority as between such mortgages.

This fourth proposition, asserting that the relations of the defendant as a sovereign to the company, and its charter, are wholly distinct from the "contract relation" which fixes the terms on which the subsidies and loan were granted, and the terms on which the company should take and pay the government loan, and on which government transportation should be performed, is so carefully considered and so explicitly ruled in this Credit Mobilier case as to render any attempt at its enforcement in this brief unnecessary, if not improper.

We think it equally true, that this decision holds that the reserved power of amendment contained in the two acts applies alone to the relation between the government and the charter proper which it had created, and does not apply to that other relation which the court calls "the relation of contract."

So the court, in effect, expressly declares, and so the principles asserted and the reasoning advanced by the court completely show.

If we are not mistaken in this last, then the case at bar is absolutely ruled by this judgment of the court, *unless* it is within the power of Congress in every case, and without any reservation of the right to do so, to add to, alter, amend, and abrogate its executed contracts with the citizen.

But since it will be denied that the Credit Mobilier decision rules that the reserved power to amend does not apply to this distinct "relation of contract," and since, moreover, in the debates of which this funding act was begotten, the power of Congress to nullify its own contracts, executory or executed, and this without any reserved right to do so, was asserted, it may be proper to present the propositions on which we rely in resistance of this startling pretension, and in assertion of our claim that this funding act, in attempting to abolish our contract rights, is grossly unconstitutional.

In so presenting our propositions, we state as our next and fifth proposition, this:

V. Since it is now by this court conclusively adjudged, or by the record admitted—

That this company "is a private corporation, the same as other railroad companies";

That the ownership of all its property is in this company as a private corporation, and is "neither in whole nor in part the property of the government" (18 Wall., 32);

That the "contract relation," under which it was stipu-

lated that the road should be made, kept in repair, operated, and give stipulated service to the government, and should receive a stipulated thirty-year loan at a designated rate of interest, payable and secured in a specified way, is a relation distinct from "the sovereign or legislative relation" which the government holds to the charter proper;

That, in making this contract with the government, "the government has taken good care of itself in that contract," and has exacted all the security it wanted, such as its second mortgage, its five per cent. of net earnings, its half transportation, its right under section 17 of act of 1862 to devote the income of the road to the use of the United States in case of the default there named, and to forfeit the road and its property in certain other events there named;

That "there is nothing due to the government under this contract, and the company is performing all its obligations to the government under such contract," and also "has fulfilled the purposes and realized the hopes in which it was founded," and this long before the time stipulated in the contract, and is in no respect in any default;

That this full and complete execution and performance on the company's part of this contract, by the expenditure of enormous values, was and is, in law and fact, *payment* of consideration for the *time* and other advantages of this thirty-year loan, and for the other terms and concessions made under this "distinct" "relation of contract";

That this company is not insolvent, and, on the other hand, its condition is such, and the annual payments to the government have been and prospectively are to be such as to induce this court at this term to say that "it is not wholly unreasonable to suggest that the amount which the company may be compelled to pay annually under these two provisions" (half transportation and five per cent. on net earnings) "will be sufficient as a sinking fund to pay the entire debt, principal and interest, before it falls due";

That the United States holds to the property of this com-

pany no relation of trust such as gives to the courts, and much less to the Congress, power to deal with this property as in any way impressed with a public or private trust—

Since, we say, all this is conclusively adjudged or confessedly true, and must, in this case, under the state of the pleadings, be assumed as true, therefore this funding act, in its order to seize, by mere mandate of Congress, the moneys and property of this company; to hold, manage, and use these according to its mere pleasure; to deprive the company of the right to enjoy, manage, and use its own income under the rights and dominion which belong to ownership; to do this, in pretended security and for ultimate payment of a debt not due by about the seventh of a century, and for which delay of payment the government has already exacted and been paid an enormous consideration; and to do this in the very teeth of the exact and unambiguous letter of this "distinct" contract of loan, by which it was stipulated that "only" one-half of the price of transportation and five per cent. of net earnings should be annually applied in payment of such thirty-year loan, and that the residue should be demandable and paid *only* at the end of thirty years, is grossly violative of every guarantee of property right known to this government.

It violates that limitation which declares—

(*a*) The legislature has "no power over the substance of that original justice" which is the basis of all government and of society itself;

(*b*) That the obligations of contracts shall not be impaired;

(*c*) That property shall be taken for the public use only upon full compensation;

(*d*) That none shall be deprived of property save by due process of law.

Reserved Power of Amendment is Not, in its Terms, an Unconditional One.

Before proceeding to consider the validity of this funding act, on the assumption that the 22d section of the act of 1864 (13 Stats., 365) reserving the power to amend, &c., in terms not qualified, is *not* qualified by the conditions attached to the power of amendment contained in the 18th section of the act of 1862 (12 Stats., 497), we wish here to carefully and distinctly state the grounds on which we rest the assertion that Congress has not reserved a power of amendment which is, *even in its terms*, unconditional; but is, on the other hand, subject to the express limitation and condition that it shall only be resorted to and exercised when necessary to accomplish the ends for which it is stated in said 18th section to be reserved, and even then it is to be so exercised "having due regard to the rights of said company."

This court has repeatedly held that these two acts of 1862 and 1864, being *in pari materia*, must be considered and read as one act in ascertaining the character and extent of the grants which they make, as well as for all other purposes. In the recent decision of this court in the case of The Missouri, Kansas and Texas Railroad Company *v.* Kansas Pacific, this was considered and held; and on this principle it was there decided that the title of the companies to their land grants "took effect, by relation, as of the date of the act" of 1862. And this court carefully points out why it is that these two acts are to be read as one act, and the grants therein to be regarded as dating as of the date of the original act. The same principle is declared in Union Pacific Railroad Company *v.* Hall, (1 Otto, 350,) and in other cases.

Now, just as of the grant of the lands, so of the other grants and of the reserved power of amendment contained in the two laws. They are to be read as one act and construed as such.

Now, to this proposition add another equally undeniable, that all parts of the same act, or of even two separate acts covering the same or similar subject-matters, which are not so repugnant as that they cannot, by any *legally possible* construction, stand together, shall stand together, and all receive from the courts their full force as laws. The last act shall not repeal the first except in so far as the repugnance compels the courts to give it that effect. (See 6 Otto, 140.)

These principles being here applied, we contend that there is not only not any *necessary* repugnance between section 22 of the act of 1864 and the provisions of the 18th section of the act of 1862, which makes the right of amendment conditional as there stated, but there is no repugnance at all. This 22d section is but a repetition of the last clause of the 18th section, with the words "add to" omitted from said section 22. Read together as one section, they read and mean that the reserved power to amend must only be exercised when requisite, "namely, to promote the public interest and welfare *by the construction* of said railroad and telegraph line, and keeping the same in working order, and to secure the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes."

Since all these purposes have been and are fully attained and enjoyed, the condition has not happened on which alone this reserved power of amendment can be resorted to.

But we affirm that the act is void, whether the reserved right "to add to, alter, amend, or repeal" shall be held to be conditional as in the 18th section of the act of 1862, or unconditional as in 22d section of the act of 1864, and whether it shall be held to apply to the provisions which create the relation of the sovereign to its creature, our charter proper, or to *both* this and that other "distinct relation of contract."

In now adding the considerations which establish this last proposition, we necessarily cover and include all other hypotheses and positions more favorable to the appellant's view. This, simply because the greater, in this case, includes the less. Hence we shall not, further than we already have, consider, in this brief, separately, these other positions—such as that the reserved power to amend does not apply to the "distinct relation of contract" at all; that the reserved power to amend is one expressly qualified and conditioned so that it can only be exercised when fairly required as contributing to secure the construction, repair, and use to the government of this road.

Congress has No Power to Interpret Laws.

In support of this fifth proposition, some statements rather preliminary in their character may be allowed, although scarcely required.

One is, that what the right of the parties are under "this relation of contract" created under these acts of 1862 and 1864, is a question judicial in its nature, determinable by the courts, and by the courts only, and the Congress has no power to declare the sense of these laws, nor to import into *them* any sense, either for the past or the future, which the courts have or shall say they have not. In fixing our rights under these statutes, they shall utter their language, both as to the past and the future, only through the mouth of the judiciary of the land, and not through Congress. How far Congress has power to alter and amend these laws, is another and the main point, to which we presently again come; but, with the exception of its power to change the language of these acts by amendment, Congress is powerless to declare what the laws *as they now stand* have meant, or shall in the future mean.

Mr. Cooley (Const. Lim., 84, note 1) says: "It is well said in Haley *v.* Philadelphia, (68 Penn. St. R., 45,) it would

be monstrous to maintain that when the words and intention of an act were so plain that no court had ever been applied to for the purpose of declaring their meaning, it was, therefore, in the power of the legislature, by retrospective law, to put a construction upon them contrary to the obvious letter and spirit." Justice Gibson, in Greenough *v.* Greenough, (11 Penn. St. R., 494,) says: "How a mandate to the courts to establish a particular interpretation of a particular statute can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not." And, in the text, Mr. Cooley explicitly states what is the indisputable law on this point. He says (page 94): "As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts, for the future, to adopt a particular construction of a law *which the legislature permits to remain in force.* To declare what the law *is* or *has been* is a judicial power. To declare what the law *shall* be is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial." (7 Johnson R., 498; 2 Penn. St. R., 25; 2 Cranch, 272; see, also, Growe *v.* Porter, 5 Humph., 165; People *v.* Supervisors, 16 N. Y., 424; Reiser *v.* Tell Assoc'n, 39 Penn. St. R., 137; Dundas *v.* Bowler, 3 McL., 397.)

The Right of Amendment Interpreted as in case of other Private Corporations.

Another preliminary proposition is, that since this court has, as we have seen, already held in the case decided at this term that the government holds no trust relation to this company or to its property, and that it is "but a railroad company with the ordinary powers of such corporations," which owns it, property precisely as such other private corporations do, therefore the government's power to alter, amend,

or repeal our contract rights is not enlarged or affected by any "visitorial" or trust powers in the government. In other words, the power to alter or amend our charter is not enlarged by any trust or public relations we hold to the government; and whatever adjudications test and decide the extent of the power of legislatures to amend the charters proper of corporations of their creation, equally tests the powers of Congress over this private charter of its creation.

The Power of Amendment Cannot Destroy Vested Rights.

With these statements premised, we now state, from the leading American case, the extent and the limitation imposed by constitutional law upon the power of the Legislature over the property of corporations of its creation, where such Legislature holds the power to alter, amend, and repeal reserved in words expressing no limitation on that power.

The leading American case upon this point is The Commonwealth *v.* The Essex Company, (13 Gray, 239,) and the opinion was delivered by Chief Justice Shaw. In that case, the reserved right of amendment was unlimited, and was in these words: "*Every* act of incorporation shall at *all times* be subject to amendment, alteration, or repeal at the pleasure of the Legislature, provided that no such act shall be *repealed* unless for violation of its charter, or other default, when such charter shall contain an expressed provision limiting the duration of the same." So that the power to alter and amend was in this case, *by its face*, absolute and unlimited, and at the pleasure of the Legislature. And yet in this case, where the question was the validity of the attempt to so amend as to require the making of additional fishways to those required by the charter, the court unanimously declare the legislation void, and Chief Justice Shaw says, among other things:

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the sphere of the reserve powers, the *vested rights* of property of corporations, in such cases, are surrounded by the same restriction, and are as inviolable as in other cases."

This limitation upon the legislative power, which protects rights of property vested before the amendment, where the Legislature held a reserved power to alter or amend which, *by its face*, was unlimited, will also be found asserted in multitudes of cases which need not be here recounted. Amongst them are

Sage *v.* Dillard, (15 B. Monroe, 357.)
Miller *v.* N. Y. and Erie R. R. Co., (21 Barb., 513.)

Indeed, we have found no case which holds that, where a property right had vested under a legitimate exercise of the corporate power as it existed before the alteration of the charter, such vested estate could be taken away under the unconditional reserved power of amendment. The fact that when this court has, in every instance where it became requisite to discuss this question, most carefully guarded and limited this reserved power to amend, so as to protect vested rights against being stricken down under the guise of amendment, it has generally been in cases where the court sustained the validity of the amendment, only adds significance and emphasis to these utterances of the court protective of vested rights; because they are exceptions carefully made against the *general* drift of the decisions in which they are found, and are sometimes found in opinions (as in Ohio *v.* Shields, 5 Otto, 324) where there were dissents from the holding of the majority of this court.

It is, we submit, impossible that we should be mistaken in supposing it safe to assume that the formula adopted by this court (15 Wall., 498; 5 Otto, 324–325) from the judgment of Chief Justice Shaw, in Commonwealth *v.* Essex Co., (13 Gray, 239,) contains the best, and the true and established, definition of the limitation, protective of vested rights, which constitutional law imposes upon the legisla-

tive power to alter or amend charters, as to which this unlimited power of amendment is reserved to the Legislature.

We therefore repeat that formula from the words of the chief justice as a proposition established in this case. The rule was laid down for a case where the reserved power to alter and amend was on its face unlimited. It says:

"*When, under power in a charter, rights have been acquired and* BECOME VESTED, *no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.*"

Or, as expressed by Justice Swayne, 5 Otto, 324, 325:

"The power of alteration and amendment is not without limit. The alterations must be *reasonable;* they must be made in good faith; they must be consistent with the scope and object of the act of incorporation. *Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.* Beyond the sphere of the reserve powers, the *vested rights* of property of corporations, in such cases, are surrounded by the same restriction, and are as inviolable as in other cases."

Is the Claimant's Interest in the Terms of this Loan a Vested Interest?

We are therefore remitted, by this rule, to the single question: Whether, before this funding act was passed, the claimant had acquired a vested property right in and under this contract for a thirty years' loan, whereby the terms of the loan, as to the time of its payment, the proportion of the earnings from government freights, the proportion of the net earnings which should be applied thereon, the kind and extent of security for repayment of the loan which should be given, cannot be destroyed or impaired at the mere pleasure of Congress?

In now proceeding to consider this question, it must be

kept in mind that, for the making of this loan upon said agreed terms, the claimant, before the passage of the funding act, had paid an enormous consideration in making, keeping in repair, and operating said road and telegraph line, as agreed on its part, and was in no default.

Keeping this in mind, we turn to the question of vested rights beyond the reserved power of repeal, as arising under a contract so executed on the claimant's part.

Power of Congress to Impair the Obligation of Contracts.

And under this head it is asserted that there can be no vested property in contracts, executory or executed, which is protected against the power of Congress to impair it, because the constitutional inhibition against such impairment applies only to the States, and leaves the United States at liberty to impair the obligation of all contracts.

At the date of preparation of this brief, we know not what may be the position of the Attorney-General on this point; but such was the position taken by some of the authors of this act when it was before the Senate; and hence, preposterous as it seems to us to be, it may be pardonable to present some considerations bearing upon even this point.

As bearing upon the limitations protective of vested rights, imposed, by the fundamental principles of constitutional governments, upon all legislatures, whether national or State, the following, from this court, in *Wilkenson* v. *Leland*, (2 Pet., 657,) is exactly in point:

"That government can scarcely be deemed free, where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and of private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to

violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative power, or ought to be implied from any general expression of the will of the people." * * * * "In Terret *v.* Strong (9 Cr., 43) it was held by this court that a grant of lands once made by the Legislature to any person or corporation is irrevocable, and cannot be reassumed by any subsequent legislative act; and a different doctrine is utterly inconsistent with the great and fundamental principles of a republican government, and with the right of the citizens to the free enjoyment of their property *lawfully* acquired. We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union."

This opinion is by Justice Story.

In Calder *v.* Bull, 3 Dall., 388-9, the court says: "There are certain vital principles of our free republican governments, which will determine and overrule an apparent and flagrant abuse of the legislative power;—as, to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property for the protection whereof government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact and on republican principles, must be determined by the nature of the power on which it is founded." * * * "*A law that destroys or impairs the lawful private contracts of citizens*" is declared to be "against all reason and justice," and therefore not law; and the court adds, in speaking of the powers of legislatures, "they may command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, *or violate the right of an antecedent lawful private contract, or the right of private property.* To maintain that our FEDERAL or

STATE Legislature possess such powers, if THEY HAD NOT BEEN EXPRESSLY RESTRAINED, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments."

In Hepburn *v.* Griswold, (8 Wall., 623,) the court, upon this point, says:

"But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition, protecting the obligation of contracts, should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish, was not thought, by them, to be incompatible with legislation of an opposite tendency. In other words, we cannot doubt that a law, not made in pursuance of an express power, which necessarily, and in its direct operation, impairs the obligation of contracts, is inconsistent with the spirit of the Constitution."

True it is, that Hepburn *v.* Griswold has been, in one particular, overruled in Legal-Tender cases (12 Wall., 457); but these remarks of Chief Justice Chase, so far as they have reference to an attempt by Congress to "*directly*" destroy a contract, as in this funding act, are not controverted by Mr. Justice Strong, who delivered the leading opinion in 12 Wallace. It will be seen (12 Wall., 548–550) that (with the exception of the *express* power to make a bankrupt law) the court takes it for granted that Congress cannot "*directly*" legislate a lawful contract out of existence. His words are, "It cannot be truly asserted that Congress may not, *by its action, indirectly* impair the obligation of contracts, if by that expression is meant rendering them fruitless or partially fruitless;" and then he enumerates declarations of war, embargo acts, and the like, as "action" by which, "*indirectly*," contracts may be rendered "fruitless."

Justice Strong did *not* say that it was within the constitutional power of Congress to "directly" enact that the bonds of the United States not redeemable for thirty years shall

be redeemable to-day; that the bonds now due shall cease to be due, and shall be payable only at the end of thirty years, and this without interest; that the Congress may, the day after the citizen has, at immense outlays, completed a public building or road for the United States, upon a solemn written contract, pass a valid law, saying, "*Be it enacted*, That the government of the United States shall retain the values received under said contract, but said contract is hereby enacted out of existence, and there shall be no obligation to pay for said work." But such an enactment would not be less remarkable than this funding act enactment, that a debt due in thirty years shall be in effect paid now, and this although the United States has been paid by the borrower immense values in the construction of said road, &c., for the very *time* granted on the loan which this funding act blots out!

In Osborne *v.* Nicholson, (13 Wallace, 662,) Mr. Justice Swayne, in discussing the inviolability of contracts as things protected by the principles of all constitutional government and of original justice, uses the following terse and vigorous language:

"Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in force.

"This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations, and let in a flood-tide of intolerable evils. It would be contrary to "the general principles of law and reason, and to one of the most vital ends of government." (Calder *v.* Bull, 3 Dallas, 388.) "The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is it to be admitted, unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs."

In discussing the question of the power of the government of the United States over vested rights, as that question arose, in Marbury *v.* Madison, (1 Cranch, 163,) Chief Justice Marshall uses the following language:

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of vested rights."

In Fletcher *v.* Peck, (6 Cr., 135,) Chief Justice Marshall uses the following language, applicable alike to all legislatures holding their authority under constitutional governments, whether State or national:

"If an act be done under a law, the succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates; and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact.

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection.

"It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely settled."

In Sturges *v.* Crowinshield, (4 Wheat., 206,) Chief Justice Marshall discussed the question of the purpose of the convention which framed the Federal Constitution in regard to the protection of private contracts, and the prevention of the mischief which had arisen out of their violation. In that connection he used the following words:

"To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable."

The drift of this discussion, so far as it relates to this matter, shows that it was not the purpose of the convention to prohibit the States from impairing the obligation of contracts, and leave the Federal government which they were forming at liberty to continue the mischief, by prohibiting it to the States, and at the same time transferring it to the government they were forming.

In the 44th number of The Federalist, p. 281, it is said that "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defenses against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights."

Is it conceivable that the framers of the Constitution, with these words upon their lips, declaring that the impairment, by legislation, of the obligations of contract was prohibited by the "spirit and scope of all existing constitutional

charters, and that additional defense against the danger of such impairment by legislatures should not be omitted from the Federal Constitution," and yet designed at the same moment to transfer the power of impairing the obligation of contracts from the States to the Federal government?

The reasoning of the judges, as found in Ogden *v.* Saunders, (12 Wheaton, 213,) shows that no such absurdity as that just stated is attributable to the framers of the Federal Constitution.

See especially the language of the court descriptive of the magnitude of the interests involved in the provision protective of contract obligations, and the mischief which had resulted from their violation, at pages 354 and 355 of 12 Wheaton.

The case of Loan Association *v.* Topeka, (20 Wall., 655,) we insist, covers the legal principle which we now consider. That principle is, that property vested in contracts is, like all other property, protected against invasion by the legislatures, whether State or national, and against both alike, except in so far as the national legislature is expressly authorized to pass bankrupt laws, or do other acts, such as declare war, which may *incidentally and indirectly* affect contracts.

In this case, the question was, whether the State could pass a law whereby the property of one private citizen could be transferred to a corporation under the guise of taxation or otherwise, such corporation seeking such transfer for the purposes of a private manufactory.

In deciding that no such power existed, the court says:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights; which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It may well be doubted, if a

man is to hold all that he is accustomed to call his own,—all in which he has placed his happiness, and the security of which is essential to that happiness under the unlimited dominion of others,—whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments,—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B."

Mr. Cooley, in his work on Constitutional Limitations, page 175, says:

"The bills of rights in the American Constitutions, forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another *would nevertheless be void.* If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat."

The note to this is as follows:

"Bowman *v.* Middleton, 1 Bay., 252; Wilkinson *v.* Leland, 2 Peters, 657; Terrett *v.* Taylor, 9 Cranch, 43; Ervine's Appeal, 16 Penn. St., 266. It is now considered a *universal and fundamental proposition* in every well-regulated and properly-administered government, whether em-

bodied in a constitutional form or not, that private property cannot be taken for a strictly private purpose at all, nor for public, without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plenitudes of power in the legislative department." (Nelson, J., in People *v.* Morris, 13 Wend., 328.)

In Duer on Constitutional Jurisprudence, it is said (page 356):

"But the national legislature has no power to interfere with *contracts*, except where it is expressly given to it."

The ordinance for the government of the Northwest Territory expressly classes contracts under the head of property rights, and provides, that "no law ought or shall ever be made or have force in said Territory that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed."

And see, to the same general effect, that it is not within the power of Legislatures (to here adopt the words of Mr. Cooley on this subject; see Const. Lim., 488) "to make any and every thing lawful which the Legislature might see fit to call taxation"; for this would be, plainly stated, an unlimited power to plunder the citizen." (See, also, cases cited in note 1 of the page last cited.)

In the case of Loan Co., just cited, it will be seen that this court, just as in Calder *v.* Bull, (3 Dall., 388, 389,) is careful to say that the *National Legislature*, equally with the States, is under this prohibition protective of the property rights of the citizen.

We insist that the Congress holds less power over these matters than the States do, because the Congress has no powers, save such as are *delegated*, either expressly or by implication. The power to impair the obligation of con-

tracts, save as to bankruptcy, is neither expressly granted nor necessary as an incident of any grant. Hence, it was not necessary to be prohibited by the Constitution to Congress, as it was necessary, or at least prudent, to do as to the States; simply because, not being *granted* to Congress, it was prohibited to Congress by the clause reserving all powers not granted to the States or the people. (See, also, Gideon *v.* U. S., 1 Abbott's Dig., 568, sec. 370.)

We now turn to one other case bearing upon this question of the power of Congress to impair vested property rights, whether vested in contracts or otherwise. It is the same case of the United States against the Union Pacific Railroad Company which we have repeatedly cited, and decided at the present term.

An inspection of the most able and exhaustive opinion in that case will show that, in disposing of the claim of the United States, made in that case, that the act ordering that suit to be brought was unconstitutional, because it created a special court for a special case, with special provisions as to uniting different and multifarious subjects of action, and was not, therefore, "due process of law," and in repudiating this claim, this court, all through the case, assumed that Congress could *not* legislate out of existence any *rights of action*, and could not legislate any *rights of action* into existence; and the court rejected this claim of the United States upon the distinct ground that the act of Congress did *not* attempt to create or affect *rights* as distinguished from *remedies*, and only provided additional *remedies* to try existing *rights*. And the court cites Bank *v.* Okeley, (4 Wheat., 245,) and other cases asserting or recognizing the power of Congress over *remedies*, and denying it over *rights*.

In view of what is now presented from this court, we submit that it is established that Congress has no power—either under these acts of 1862 and 1864, or in any other case—to confiscate vested property rights, whether vested

in executed contracts, contracts executory, or in any other property lawfully acquired.

For having so fully considered a matter which, before the late debates in the Senate demanding the enactment of this "funding law," we deemed as fixed and settled as any provision of the American Constitution or bills of rights, we again crave the pardon of the court.

Our apology for having considered this power of Congress to impair the obligation of contracts at all, is, that unless the Congress has such power, then the funding act is utterly void.

What has now been said establishes, that because a vested right of property is found in the form of a contract, does not make it an exception to other forms of property in the sense that it brings it within the power of Congress to destroy it; and we proceed to the further consideration of the question, whether this contract of loan, as disclosed by the record, did, before the date of the funding act, create, in the claimant, *vested* property rights.

We have already stated the consideration we had paid the United States for that loan and for the *terms* and *time* on which it was made to us. We now present some authorities to show that these facts under these statutes did create a vested estate in the claimant before this funding act was passed.

Claimant Had a Vested Estate in the Thirty-Year Loan.

Under this head, it is proper first to call to mind in what the obligations of a contract consist; what things they are which impair such obligations; and hence, find what elements or incidents of contracts they are which create *rights*, vested property, which legislatures may not destroy.

On this point, this court lays down the rule in these words in the cases of Green *v.* Biddle (8 Wheat., 84) and in Van Hoffman *v.* City of Quincy (11 Wall., 553):

"The objections to a law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. (4 Wall., 552.) *Any* deviation from its terms *by postponing or accelerating the period of performance which it prescribes*, imposing conditions not expressed in the contract, dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

(See, also, Bronson *v.* Kinzie, 1 How., 316.)

On the direct point as to whether we have a vested property right in the *terms* of this loan, we first call the attention of the court to a case (and to the authorities there cited) where the legislature attempted to *change* the time at which the party should *receive* (in our case *pay*) the value of the property involved in the suit. It is the case of Palairet's Appeal, (67 Pa. St. Rep., 479,) where was brought in view the question, whether the act of 15th April, 1869, was valid, which authorized irredeemable ground rents to be discharged and paid off by payment of their value in a gross sum, to be found by a jury in a specified judicial proceeding. Its validity was sought to be vindicated, and was, in the court below, rested on the State's right of eminent domain. It was *not* an attempt to take property at the will of the legislature at *less than full value*, but was an attempt to compel the citizen to take its full value *at a time different from that stipulated by his contract of leasing.*

The following proposition, cited from the opinion of Story, in Wilkinson *v.* Leland, 2 Pet., 667, is quoted by the Justice, Sharswood: "A government can scarcely be deemed free, where the rights of property are left solely dependent on the will of the Legislature, without any restraint; and we know of *no case* in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has

been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

We suppose we ought not to cite authorities to show that values secured by contract to "A" are the property of "A," and within this rule here stated by Story.

"In this assertion," says Justice Sharswood, p. 487, "he is fully sustained." And the court then cites the following authorities: Vareck *v.* Smith, 5 Paige, 137; Hoke *v.* Henderson, 4 Dever, 1; Norman *v.* Heist, 5 W. and S., 171; Pillsburg *v.* Scott, 1 Barr, 314; Lambertson *v.* Hogan, 2 Barr., 24; Brown *v.* Hummel, 6 Barr, 86; 9 Barr; 1 Yates, 260; 17 N. H., 57; 16 Cal., 163; 45 Me., 509; 2 Dutch., 13; 3 Bradf., 7; 2 Seld., 368; 1 Jones, 489; 6 Harris, 111; 5 Barr, 149.

The court, after fully considering whether the act could be sustained as an exercise of the power of eminent domain, proceeds to say, p. 492:

"If this act cannot be sustained on this ground," (eminent domain,) "then it seems clear that *it impairs a contract, and is, therefore, prohibited, as well by the Constitution of the United States as by the Constitution of this Commonwealth.* Here is a *perpetual* covenant—personal as to the original covenantor, but running with the land—to pay *an annual* rent issuing out of it; and the act, by the proceeding under it, authorizes a decree which releases *one* of the parties from the performance of his contract upon the doing of a collateral act, not stipulated in the contract itself. No one has ever supposed that an act of assembly could authorize, in the case of a lawful existing contract, one of the parties to tender a collateral thing in satisfaction or extinguishment of it, whatever the value of the thing might be as compared with the damage sustained by the breach. Yet, in effect, that is just what is done by this act. The covenant is to pay an *annual rent, forever*; a jury are authorized to say what principal sum shall be a satisfaction and extinguishment of that covenant; a collateral thing not

provided for in the contract, which might as well be anything else as money."

Goggens *v.* Turnispeed, 1 S. C., (N. S.,) 80, is upon a statute where it was attempted by section 6 to make an open accounts bear, in the past and in the future, interest at not over 7 per cent.: held void as to past accounts, the court citing the words of Ogden *v.* Saunders, 12 Wheat., 213, where the court says: "*Anything which enlarges, abridges, or in* ANY MANNER CHANGES the intention of the parties, resulting from stipulations in the contract, necessarily impairs it." See also cases in note 3, p. 363, Cooley.

These cases bear upon both the point as to what constitute the obligations of a contract, and the other point, that the owner of a contract has property or *vested* rights in its *terms*, which are under the constitutional protections thrown over all forms of property.

The following cases tend to illustrate the question *when* and *how* a right becomes one "vested," or becomes property, so as to be, as such, within the protection due to all forms of property. Most of them also tend to the establishment of propositions we have already considered, both as to the want of power in Congress to abolish vested rights, or to use judicial functions touching property rights, which are confided by the Constitution to the courts.

(1) A law prescribing what may pass by wills cannot be changed, so as to give to devisees what had, by reason of a forfeiture, vested in heirs before the change of the law. (Southard *v.* R. R. Co., 2 Dutcher, 13.)

(2) A legacy to a society, which failed to vest because the society was not incorporated, and which, therefore, vested in heirs, cannot, by the Legislature, be confirmed in the society. (State *v.* Warren, 28 Md., 328.)

(3) Dower vested by reason of husband's death cannot be changed or defeated by a change of dower law. (Lucas

v. Sawyer, 17 Iowa, 517; Burk *v.* Barron, 8 Clark, Iowa, 132.)

(4) Even a contingent remainder in personal property derived by a husband under his marital rights, cannot be defeated by a change in the law made before the contingency happened upon which the remainder was limited. (Dunn's Admin. *v.* Sargent, 101 Mass., 336.)

(5) A bounty already earned cannot be afterwards diminished by the Legislature. (People *v.* Auditor, 9 Mich., 327.)

(6) A holder of scrip, duly presented against an existing fund, cannot be cut out of such scrip by a change in the law. (La Forge *v.* Magee, 6 Cal., 650.)

(7) A right of action against a town for pauper supplies, cannot be defeated by a change in the poor law. (Pembroke *v.* Epson, 44 N. H., 113.)

(8) When a claim is barred by the statute of limitations, the party entitled to the bar is thereby invested with a right of which he cannot be deprived by legislation.

This court says in Leffingwell *v.* Warren (2 Black, 605): "The lapse of the time limited by such statutes not only bars the remedy, but extinguishes the right and vests a perfect title in the adverse holder."

(9) So, also, to here adopt the words of Cooley (page 96, note): "The legislature has no power to grant to parties a right to appeal after 'it was gone under the general law.' (Hill *v.* Sunderland, 3 Vt., 507; Burch *v.* Newberry, 10 N. Y., 374.) Besides the authorities referred to, to show that the legislature cannot grant a new trial, see Lewis *v.* Webb, 3 Green, 326, and a large number of cases cited in said note on page 96, Cooley's Const. Lim.

(10) "So, also, (says Cooley, page 94,) "if the legislature cannot thus indirectly control the action of the courts by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly by setting aside judgments, compelling them to grant new

trials, ordering the discharge of offenders, or by directing what particular steps shall be taken in the progress of a judicial inquiry."

(11) "Not only cannot the legislature strike down judgments of courts, but it cannot do the much less thing of changing the appraisement laws which were in force when the contract was made on which the judgment was taken, so as to require the property liable for the judgment to be sold for two-thirds of its appraisement, when no such requirement existed when said contract was made. (Cooley, 289; McCracken *v.* Hayward, 2 How., 608.) Nor can the legislature so change the law so as to take away a right of possession of mortgaged premises until after foreclosure. (Cooley, 290.) So a law which shortens the time of redemption, after foreclosure, is void, because the rights of the parties are fixed by the foreclosure decree and the law then in force. (Cooley, 290.) See same principle in Bronson *v.* Kinzie, 1 How., 311."

The result of these cases is to irresistibly establish—

That when, before the "funding bill" was passed, we had paid, by making this road, the consideration on which the government had solemnly agreed not to require any payment on the loan, or any security for that payment, other than was stipulated for and given, prior to the expiration of thirty years, then the claimant became the absolute owner of a vested property interest in that loan and in all the terms thereof; and that it then ceased to be possible for Congress to destroy that vested property right, either in virtue of the reserved power of amendment or otherwise.

The Funding Act a Device to Compel Payment Before Maturity.

This funding act was defended against the allegation that it compelled virtual payment, before maturity, of a

debt no part of which was due, on the ground that it did not compel *payment*, but only *security*.

We respectfully submit that this reply sets up a *form* for the purpose of disguising *substance*—resorts to a *device* in order to hide *reality*—in a way which has hardly the merit of ingenuity.

First. By calling its sinking fund not "payment," but "security," it does not even *seem* to avoid the fatal objection to it, that it thereby violates a vested right given us by our *executed* contract, that no *other* security should (whilst we performed all the terms of our contract) be demanded of us save and except the security nominated in the bond, every farthing of which security has been given and retained.

Next. In exacting from us, not *property*, but *money*—in taking this *money* into its own possession, management, and use, and out of ours, and in crediting us with such rates of interest on the money exacted, and this rate *below* that with which we are charged on the loan, it takes from us the *same* exact values, benefits, and things which are requisite to make the transaction in law and fact "payment" on the loan, only with this difference: that did this act of spoliation get from its author the name of "payment" instead of "sinking fund," and were credited as such, a rate of interest would thereby be credited to the victim which is not realized by reason of stamping the transaction with a false name.

Since the law is reputed to look through shadows and shams, and detect and deal with "the substance of things," we do not apprehend that this court will be deceived by the *name* which has been given by the authors of this contrivance to their gauzy device.

When it was urged in the Senate that we were only to be deprived of the *use*, possession, control, and management of the money exacted for this sinking fund until the maturity of our debt, and that only then our "*title*," as dis-

tinguished from use, control, or enjoyment, would pass to the United States, it was claimed that an answer was furnished to the charge that this act takes away our property without due process of law, and without compensation. The point made was, that taking away all use, possession, management, and enjoyment of property fifteen years before any demand on us was due, was neither payment of the debt before due, nor "*taking*" property without due process of law, or without full compensation.

A reply to this preposterous proposition is only excusable because it was the argument and foundation on which the law was passed which brings this case to your bar.

We content ourselves with making that reply by citing a single case from this court.

In the case of Plumpelly *v.* Green Bay Company, (13 Wall., 166,) the exact contention was set up, which we now notice as the ground on which the "funding act" was defended against the charge that it "took" our property without due process of law, and without compensation.

There the question was whether land, which was not "taken" in the literal sense of the word "taken," but only was overflowed under an alleged authority from the laws of Wisconsin, was nevertheless "taken" in the sense of the Constitution of Wisconsin, which provides that the property of no person shall be taken for the public use without just compensation therefor." It appeared in the case that the plaintiff's title, use, and possession of the land were in no way interfered with save by the overflow of water caused by a dam.

And this court held that this land was "taken" in the sense of the Constitution.

In deciding this question, Justice Miller uses the following language (pp. 177, 178):

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law always under-

stood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held, that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law instead of the government, and make it an authority for invasion of private rights under pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Importance of Principles Here Involved.

In closing this argument, we trust we will be excusable in alluding to the gravity and dignity of the principles and rights involved in the case.

The fact of these principles being put on trial, at all, at the bar of *any* court, in *any* free country, at this period in the history of constitutional liberty, would seem to present a spectacle out of accord with all of the best and most fixed traditions and thought of the age; because no thought of the age is better or more fixed than that which regards the tenure of private property as beyond the reach of parliaments. But the spectacle which, as we deem, this case presents, as one putting on trial at *this* bar, in *this* country, at *this* age, not similar, but the *same* right to possess and enjoy property without molestation save "by due process of law," which was put on trial six and a half centuries ago, and was then granted by the concession of a tyrant in a deed which we are fond of calling "The Great Charter," and which thenceforward became the basis of English liberty, is one of start-

ling suggestiveness. But that *such* a trial of *such* principles should be brought to this court by an act of Congress, which covers an attempt to take the property of one citizen and give it to another,—or worse, the spoiler,—with almost no disguises, must excite in every thoughtful mind the deepest concern.

And then add to these considerations the fact that the authors of this, as seems to us, invasion of the most sacred principles of right upon which society itself must ever rest, went from this court and from the benches of their States to secure the enactment of this wrong, by proclaiming that Congress had power to impair the obligation of contracts, and without compensation to appropriate to its own use all the stupendous values invested in such contracts, and the gravity of this case, with its attendant history and circumstances, becomes extremely painful.

These references to the circumstances of which this case is born, are made with no other purposes than are fit for the high presence in which they are uttered. In characterizing this law as we deem it, we do not forget that, even though it be as wrong as we think it is, yet its authors doubtless deemed it right; and although how it *can* be right is to us, we confess, inconceivable, yet in what we have said we do not forget the possibility that the law may not be wrong. Still we have spoken of it as we have. We have done so in what we regard as the highest, though often the most painful, duty which we owe to our profession and to the courts, commanding us to shrink from no duty—to shrink no more when it demands the arraignment of oppression or wrong proceeding from the very sources of power, than when from the feeblest and the most lowly.

We speak as we do, because we would spare no effort to impress upon the court our own convictions of the magnitude of those interests of civil society which are on trial at your bar.

Since it is the American Congress itself which has again

here put on trial the best and plainest grants of the *Magna Charta*, more than six hundred years after they passed unquestioned—and, as we supposed, eternal—into the Constitutions of all free States, we have deemed that it was neither safe nor fit that counsel, charged with the responsibilities of such a case, even in this court, should take it for granted that they can omit any argument or appeal which may tend to just conclusions by the court, and the defeat of what they deem an immense wrong.

In so far as this trial presents an invocation to this court to interpose its calm and considerate judgment, its exalted learning, its trained methods, and above all its unbending integrity and impartiality, between the rights of the people to possess and enjoy their property, and the usurpations of parliaments, it is no novel spectacle, but only is history repeating itself. Since and before the time when Lord Thurlow characterized the attempt of the British Parliament to make a law like this funding act, striking down vested property in the East India Company, as "an atrocious violation of private property which cut every Englishman to the bone," the records of the courts of England and of this court present ever-recurring proofs of the wisdom of all modern Constitutions in interposing between the haste, the ambition, the greed of power, and the other bad besetments of legislative bodies, and the fundamental rights of the people, the independent, enlightened, and deliberate judgment of the courts of law. In the records of this great tribunal, from the date of its organization until to-day, will be found the amplest proofs of that wisdom.

It is a matter of universal recognition, in this Republic, that when the rights of corporations are selected to be the victims of legislation, then the principles of public morality, of original justice, and of common law, too often go down under the combined forces of demagogery and of perverted ambition, building upon the real or supposed prejudice of

the populace and of the commune against corporations and capital. And your judgment upon the validity of this law will determine whether the event, which has forced this case upon your consideration, is not one of those ever-recurring ones which mar the histories of all legislatures, where the courts have been called upon to correct the errors begotten of these bad besetments of popular bodies.

We need not remind this court how frequent such errors of legislation, brought to this bar, have been found in the past. Should this court sustain our position, in asserting that this act of Congress is grossly violative of property rights, and is therefore void, the judgment will be one in *kind* most familiar to your records. We know of no liability in State legislatures to be moved to bad legislation, as against corporations or other property rights, from which the Congress is exempt; and in referring to the number and character of the laws which have perished under the judgment of this court, (and which reference we make as persuasive of the fallibility of all law-makers,) the fact that the laws which have so perished were laws of the States, does not weaken the force of this our appeal to the history of legislation as written in your own record.

In the case of New Jersey *v.* Wilson, (7 Cr., 164,) Chief Justice Marshall held the act of the New Jersey Legislature void which attempted to tax Indian lands which had, by a former act creating a contract, been exempt from such tax.

In Dartmouth College, (4 Wheat., 518,) the Legislature of New Hampshire, attempting to alter the charter of the college, was held void; and the opinions of the three judges in that case place the security of property, invested in contracts executed, against assault by any and all legislatures, upon foundations as indestructible as are the foundations of organized society.

In Green *v.* Biddle, this court, Story giving the opinion, declares void an act of the Legislature of Kentucky because

it attempted to take from the citizens of that State property rights which the contract of separation between Virginia and Kentucky secured to them.

In Gibbons *v.* Ogden, (9 Wheat., 1,) Chief Justice Marshall holds a grant of the right to navigate the Hudson, by act of the Legislature of New York, void, because it invaded the powers of the United States over commerce and coast navigation.

In McCrackin *v.* Haywood, (2 How., 60,) this court held void a law of Illinois, as impairing the obligations of contracts, which attempted to prevent sales of property on execution for less than two-thirds the valuation, when the judgment was one rendered on a contract.

In Searight *v.* Stokes, (3 How., 351,) Chief Justice Taney delivered the opinion of the court, holding an act of the Legislature void, which attempted to impose tolls on carriages carrying the mails, when the toll was violative of a contract, between Pennsylvania and the United States, fixing the terms on which the State took possession of the Cumberland road.

In Gordon *v.* The Tax Court, 3 How., 133,) the court held void a law of Maryland taxing shareholders in a bank, when the State had agreed not to so tax the shares.

In Neal *v.* Ohio, (3 How., 720,) this court held a law of Ohio void, as violative of the contract on which the State took the Cumberland road, which taxed passengers in mail coaches, to the exclusion of all other passengers.

In Achison *v.* Huddleson, (12 How., 293,) this court held void a tax law of Maryland under facts similar to those in the case of Neal *v.* Ohio, last cited.

In Pennsylvania *v.* Wheeling Bridge, (13 How., 518,) this court held void, as impairing the obligation of the contract between Kentucky and Virginia, securing the free navigation of the Ohio river, a law of Virginia authorizing the obstruction of that river.

In Woodruff *v.* Trapnall, (10 How., 190,) this court held

void, as impairing contracts, a law of Arkansas which repealed a clause in a bank charter, the State being the sole stockholder, which clause made the bills of the bank receivable for State dues.

In Hartford *v.* Bridge Company, (10 How., 51,) this court held a law of Connecticut invalid, which attempted to restore a ferry which a competing bridge company had, under a contract with the State, rendered a consideration for being discontinued.

In State Bank *v.* Knoop, (16 How., 369,) this court held a law of Ohio invalid which attempted to tax a bank in contravention of a term of the bank charter. The same thing is decided in Franklin Bank *v.* Ohio (1 Bl., 474).

In Binghamton Bridge, (3 Wall., 51,) this court held a law of New York void as impairing a contract, which attempted to license the erection of a bridge in violation of that contract with the State, under which another bridge was constructed, and which agreed that no other bridge should be licensed, as the invalid law attempted to do.

In Howard *v.* Bugbee, (24 How., 461,) this court held a statute of Alabama void which attempted to change the law governing the sale of lands sold under a decree of foreclosure, from what it was when the mortgage was given.

In Home of the Friendless *v.* Rouse, (8 Wall., 430,) this court held a law of Missouri void which attempted to tax the corporation in violation of the charter which exempted it from such tax.

In Barings *v.* Dabney, (19 Wall., 1,) this court held void, as impairing contracts, a law of South Carolina which took from the creditors of a bank, in which the State was the sole stockholder, certain assets which the contract of charter entitled such creditors to.

In Humphreys *v.* Penges, (16 Wall., 224,) this court held a law of South Carolina void, as impairing a charter contract exempting a railroad from the taxation, which the invalid law attempted to impose.

In Pacific Railroad Co. *v.* Maguire, (20 Wall., 36,) this court held void the provision in Constitution of Missouri of 1865, which attempted to tax the company in violation of the law which gave the charter exempting the company from such tax.

In New Jersey *v.* Yard, (5 Otto, 154,) this court held that in every case it is a question of intention as to whether, in granting a charter, or a supplement thereto, it was the intent of the Legislature to make the charter contract one subject to amendment or repeal; and the court held, in that case, that it was not the intent to make the grant so subject, and hence, that a certain clause exempting from taxation, was not so subject, and that a law of New Jersey of 1873 which attempted to impose a tax was void.

In Farrington *v.* Tennessee, (5 Otto, 679,) this court declared a law of Tennessee void for the same reasons as in the last-cited case.

In Murry *v.* Charleston, (6 Otto, 412,) and also in Edwards *v.* Kearsey, (6 Otto, 595,) this court pronounces certain acts of South Carolina and North Carolina void as impairing contracts.

These are but a fraction of the long line of decisions where this court has stricken down the action of legislatures which attempted to invade rights of property vested in contracts.

This glance at the history of this court is not made because it shows cases *directly* bearing upon the want of power in *Congress* over *property* in contracts, for they do not directly involve *that* power. But this history is presented for the purpose of reminding ourselves of that vast fact—one most honoring of all others in the history of this august tribunal—that the Supreme Court of the United States has stood as the impassable barrier, and as the sleepless defender, of the ultimate rights of the people to liberty and property, whenever these have been invaded, whether as owned by the high or the low, by the individual or the

corporations,—by the hasty, the ignorant, or the depraved action of legislatures.

That there are few cases in which this court has been called upon to strike down the action of Congress, directed to the invasion of rights of property invested in corporations, is not owing to the fact that the Congress is less open to the causes which, in the legislatures of the States, produce the legislation which this court has annulled, nor because this court has not *power* over such legislation of Congress, but is owing to the fact that legislation by Congress in creation and regulation of corporations has, until within fifteen years, been almost unknown in our legislative history.

The judgment of the court in the present case may throw light upon the question whether this court will regard with more veneration the conclusions reached by Congress, as embodied in its laws, in regard to its power to abolish the principles of original right, and the tenures of private property, than this court has shown where the legislatures of the States have been brought to this bar for the trial of the laws which assailed the best principles of the Constitution.

SHELLABARGER & WILSON,
Counsel for Claimant.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

UNION PACIFIC RAILROAD COMPANY
vs.
UNITED STATES. } No. 1083.

CENTRAL PACIFIC RAILROAD COMPANY
vs.
ALBERT GALLATIN. } No. 972.

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STATEMENT IN No. 1083.

1. During the month of July, A. D. 1878, the claimant, at the request of the defendant, transported troops of the United States over the claimant's road, as averred in the petition.

2. The amount and value of the service so rendered by the claimant for the defendant, as stated in proposition first, was and is the sum of $10,451.13, the same being fair and reasonable compensation for said service, and not exceeding the amounts paid by private parties for the same kind of service.

3. That amount was duly allowed and audited by the accounting officers of the Treasury for the said service on the 8th day of October, A. D. 1878. (See Record, p. 10.)

4. On the 28th day of October, A. D. 1878, the claimant

demanded of the defendant the one-half of the said sum, to wit, $5,225.68½, and protested against the payment of said one-half into any sinking-fund or its application to the payment of bonds issued by the United States to said company or to the interest thereon, and against the retention of said one-half by the United States on any account whatever.

5. On the 4th day of November, A. D. 1878, the proper officers of the Treasury Department of the United States issued a warrant, No. 5950, for the said amount of $10,451.13 on account of the transportation aforesaid.

6. On the 5th day of November, A. D. 1878, the Secretary of the Treasury refused to pay the said one-half to the claimant, giving as his reason therefor that the same was required by an act of Congress, approved May 7, A. D. 1878, hereinafter referred to, to be turned into a sinking fund as provided in said act.

7. November 6, 1878, a draft to the order of Secretary of the Treasury, assignee of Union Pacific Railroad Company, for $10,451.13, was issued. The Secretary of the Treasury made the following indorsement on the draft:

"Pay to the Treasurer of the United States, to be by him deposited in the United States Treasury, in general account, on account of moneys received from the Union Pacific Railroad Company, being the compensation found due it for transportation performed for the War Department in July, 1878, and withheld in accordance with the provisions of section 2, act May 7, 1878, as follows:

"One-half, $5,225.86, on account of reimbursement of interest paid on bonds issued to the Union Pacific Railroad Company.

"Credit to be given under date of August —, and one

half, $5,225.87, on account sinking-fund, Union Pacific Railroad Company, to be carried to credit under section 4, of the above act.

"JOHN SHERMAN,
"*Secretary of the Treasury,*
"*Assignee Union Pacific Railroad.*"

And the assistant treasurer of the United States indorsed the same.

8. The assistant treasurer of the United States issued a certificate of deposit, showing that $10,451.13, on account of moneys received from the Union Pacific Railroad Company, being compensation found due it for transportation performed in July, 1878, and withheld, &c., have been deposited in the Treasury.

9. Revenue covering warrants were issued, showing the moneys before mentioned have been covered into the Treasury, one-half—viz, $5,225.87—on account of sinking-fund.

10. The Secretary of the Treasury directed the Treasurer of the United States to purchase at the end of each month five per centum bonds of the United States to the amount of the moneys withheld from the Union and Central Pacific Railroad Companies since July 1, 1878, and apply the same to the credit of the company from which the money may have been withheld, the bonds to be registered in the name of the Treasurer of the United States. In a schedule annexed, the sum of $5.225.87 appears as having been withheld on this account.

11. The Treasurer of the United States, in accordance with the directions above recited, purchased bonds of

the funded loan of 1881 for account of the sinking fund Union Pacific Railroad Company to a large amount.

12. An appropriation warrant was issued on account of sinking fund Union Pacific Railroad Company for the amount expended by the Treasurer of the United States in the purchase of 5 per centum bonds as before recited, and there was included in the amount appropriated the sum of $5,225.87, which had been deposited and covered into the Treasury, as shown in the other findings.

13. The claimant never assigned or in any way parted with the claim sued for; but the issuing of said warrant mentioned in finding No. 5, in favor of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, and the issuing of the draft on said warrant, as found in finding No. 7, payable to the order of the Secretary of the Treasury as assignee of the Union Pacific Railroad Company, was each the act of the defendant, done without the consent of the claimant, and the said warrant and draft were issued in that form for the purpose of enabling the proper officers of the Treasury Department to place the said money in the Treasury, as found in the preceding findings.

14. The amount so placed to the credit of the sinking fund, to wit, the sum of $5,225.87, as hereinbefore found, is the one-half of the money earned by the claimant, as found in the above findings 1 and 2, and for which half this action is prosecuted. (Record, 5 to 7.)

The conclusion of law upon these facts was that the petition should be dismissed, and it was so adjudged (*Ib.*); from which judgment the petitioner took this appeal.

STATEMENT OF No. 972.

This is a bill brought by a stockholder of the Central Pacific Railroad Company against the corporation and its directors, stating that the defendants declared the act approved May 7, 1878, to be unconstitutional, and that they will not make the payment into the sinking fund required by its provisions, nor conform to any of its requirements; and that, although in default in payment of the 5 per cent. of the net earnings required by that act, they had declared a dividend, which, if paid, would create an inability to comply and would prevent compliance with the demands of said act, thereby forfeiting the franchise and estate of the corporation, causing irreparable injury to the complainant and the other stockholders; wherefore it is asked that the defendants be perpetually enjoined from paying such dividend and required to obey the statutory commands.

"The Thurman bill," act of May 7, 1878 (20 Stats., 56), the constitutionality of which is here brought in question, opens with a mention of the Pacific Railroad acts of 1862 and 1864, and recites that the Union Pacific and the Central Pacific each availed itself of the benefit of these acts, each constructing "some part of the line mentioned" therein, and calling for and receiving government bonds to a large amount under their provisions, and issuing their own to a large amount, creating a lien paramount to that of the United States, and have incurred liabilities (exclusive of accruing interest and in-

cluding the debt to the government) amounting to over $96,000,000 for the Central Pacific, and more than $88,000,000 for the Union Pacific; that, in view of this vast indebtedness, and *of the manner in which these corporations operate their roads and dispose of their incomes*, the United States cannot be secured without further legislation, required by the rights of the companies and of the government, in order to preserve the same, by means of an amendment of the acts aforesaid, demanded by the premises and other causes of public good and justice, agreeably to the powers provided and reserved in the act of 1864; therefore it is enacted in section 1 that the "net earnings" mentioned in the act of 1862 "shall be ascertained by deducting from the gross amount of their earnings, respectively, the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair;" also the interest paid upon their first-mortgage bonds, &c., excluding all other interest; previously existing rights not to be affected by the provisions of this section.

The second section reserves the *whole* compensation derived from services performed for the government, applying one-half toward the interest accruing upon the bonds delivered to these roads, and the other half to create a sinking fund for the purposes mentioned.

Section 3 establishes this fund, to be invested in government bonds, giving preference to the 5 per cent. bonds, which are to be stamped as belonging to this fund, and only disposed of as provided in this act.

The fourth section requires that the half compensation aforesaid shall be carried to the credit of this fund February 1 of each year, and that the Central Pacific Railroad Company shall on that day pay into the Treasury

$1,200,000, "or so much thereof as shall be necessary to make the 5 per cent. of the net earnings of its said road, payable to the United States under said act of 1862, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum required by this section to be paid, amount in the aggregate to 25 per cent. of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided for the year ending on the 31st of December next preceding."

For the same purpose the Union Pacific is required to pay $850,000 on the 1st of February of each year, or so much thereof as may be necessary to accomplish the above-indicated result.

Section 5 authorizes a remission of so much of said payment as may be necessary to supply any insufficiency of 75 per cent. of the net earnings for any year to pay the interest accruing on the first-mortgage bonds for that year.

The sixth section prohibits the payment or declaration of any dividends at a time when the company is in default of payment of the requisite sum to the sinking fund, or of the 5 per cent. of the net earnings, or of interest on its first-mortgage bonds, and authorizes the recovery of any dividend paid under these circumstances, punishing the persons making it.

Section 7 declares that the sinking fund shall be applied to the extinguishment of the bonds issued by the United States to these corporations, at their maturity, in the manner provided in the next section.

The eighth section says that this sinking fund, in the proportions contributed by each company, shall be held for the benefit of the creditors of the company, in the

order of priority under existing laws, and according to the principles of equity; "but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage lien or other creditor of any of said companies respectively, nor to excuse any of said companies, respectively, from the duty of discharging, out of other funds, its debts due to any creditor except the United States."

Section 9 creates a lien upon all the estate, rights, franchises, and income of these companies for all sums due the United States, whether presently payable or not, including those to be paid into the sinking-fund, subject to any prior liens or claims; "but this section is not to be construed to prevent said companies respectively from using and disposing of any of their property or assets in the ordinary, proper, and lawful course of their current business, in good faith and for a valuable consideration."

Section 10 imposes upon the Attorney-General the duty of enforcing, by proper proceedings, all the rights of the United States, in anywise accruing, against said corporations; and upon the court the duty of deciding any such cause according to the very right of the matter, without regard to merely formal objections, not affecting the merits.

Section 11 forfeits all the rights, privileges, grants, and franchises of any road failing for six months to comply with the requirements of this act; and it is made the duty of the Attorney-General to cause such forfeiture to be judicially enforced.

The twelfth section declares the right to amend this act and those to which it is amendatory; and nothing

contained in this act shall impair any existing right of the United States.

The concluding section (13) makes every provision of this act an amendment, both of the act of 1862 and of that of 1864.

This act of May 7, 1878, is not here printed in full, because it will be found in the pamphlet edition of the Pacific Railroad laws distributed to the court at the argument of the five per cent. cases.

BRIEF.

The last section of the act of 1864 is, "That Congress may at any time alter, amend, or *repeal* this act."

I.

In his recently published work on corporations Judge Potter thus states an old and familiar principle: "The corporation itself is bound during its existence to administer its funds for the benefit of its creditors and stockholders, *and all others interested in its pecuniary affairs.* And at its dissolution creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporated body, are regarded as sustaining in that respect the same relation to the former as that sustained by the corporation. And *in equity the property of the corporation is regarded as held in transfer for the payment of its debts.* And, also, that stockholders are not entitled to any part of the capital stock or dividend of the profits, until all the debts are paid. And the rights of the creditors are recognized to pursue corporate property into whose possession soever it may have passed, unless transferred to a *bona fide* purchaser; and even assets derived from the sale of corporate property will be regarded as substitutes for the things sold." (1 Potter's Law of Corps., 389, § 308.)

It is evident that the law under discussion is based upon this principle. It is in the nature of a law allowing a bill *quia timet;* or of a statute authorizing inter-

position to preserve rights seen to be endangered by a course adopted and pursued by a debtor. The legislatures of most (if not all) of the States have authorized proceedings by a creditor or mortgagee to prevent waste by the debtor of the real or personal estate pledged to secure a debt; and the taking possession of the assets of a corporation, to see that they are faithfully applied so as to protect creditors, whether the debts have matured or not; and to prohibit the declaration of any dividend of earnings to the detriment of those whose claim upon the capital is superior to that of the stockholders. It is also a common precaution to require insurance and banking companies to deposit funds or securities with a State treasurer, as the condition of doing business, irrespective of whether or not such an enactment antedated a charter already granted by the State so legislating, and affected by these provisions. It is the mere accident of the present case, that the sovereign which creates the law is also the creditor to be protected. This does not affect the merits of the question. The interest to be subserved is the same in this as in the other cases, viz, that of the public.

Therefore, as a matter of general legislation, this act of May 7, 1878, might have been passed, even if the power of Congress were as restricted by existing obligation as is that of a State legislature; or if the acts of 1862 and of 1864 contained no reservation of the right to amend or repeal them.

II.

Congress is not expressly debarred by the Constitution from passing a law which may incidentally impair

or affect the obligation of a contract in some of its provisions. The prohibition is against any *State* doing this. *Expressio unius*, &c., may, perhaps, apply here. In the clause referred to (art. I, sec. 10) it is noticeable that *everything forbidden to the State is something which it is competent to the United States to do*, except the passage of attainder and *ex posto facto* laws and the grant of a title of nobility: and this last-excepted power is explicitly denied the Federal Government in the next preceding section of the Constitution, and that of passing bills of attainder and retroactive laws by another sentence of that section.

The power to establish a system of bankruptcy is a power to abrogate contracts between citizens by wholesale, "so it may relieve parties from their apparent obligations indirectly in a multitude of ways." (Legal-Tender Cases, 12 Wall., 550, top; Evans *v.* Eaton, 1 Peters, C. C., 323.)

What is meant by indirect release from obligations is very evident. For instance, there is no power *expressly* conferred upon the United States to make any contract at all. It is *implied* from the erection of a sovereignty. (Dugan *v.* United States, 3 Wheaton, 172; United States *v.* Hodson, 10 Wall., 407.) The validity of the statutes giving priority to debts due to the government is placed upon the constitutional duty of providing for the public debt. (United States *v.* Fisher, 2 Cranch, 396.) The *effect* of this priority is that the debtor is unable to fulfill earlier obligations to individual creditors. So a statute, constitutional as providing means to secure a debt to the government, may take property previously inaccessible, or vary existing rights. The *direct purpose* is to provide for the public debt; the *indirect result*

is that other creditors have to go unpaid; or that property of the debtor previously exempt is subjected to this liability. The legislature may, at any time, extend such liability to attachment and execution for debt; or provide additional remedies for the security or payment of a debt.

III.

These acts of 1862 and 1864 are not *mere contracts*, but are also *statutes*. (31 N. J. Law, 579, case cited infra.)

As such, they are liable to modification or repeal by the body originally enacting them.

They were the exercise of legislative functions, to subserve the highest federal purpose. At the date of approval, they were believed to be highly important to the preservation of the federation in its integrity, and doubtless were so.

Congress did not merely *contract* for the preservation of the Union; it passed laws to that end, reserving the right to alter and amend such laws as national exigencies might require. It authorized the construction of these roads for uses for which it was constitutionally bound to provide.

In this statute, it delegated the exercise of the right of eminent domain—a thing hardly to be accomplished by mere contract. In this very important particular, railroad, canal, and turnpike corporations are *sui generis*. (R. R. Commrs. *v.* P. & O. C. R. R. Co., 63 Maine, 276, 277, *et seq.*)

Whatever is given by statute may be taken away by statute, especially if the right of revocation or modification is reserved. (State *v.* Haeflinger, 31 Wis., 262; Perrine *v.* Chesapeake Canal Co., 9 Howard, 184.)

"These statutory provisions form, in my opinion, a contract neither in letter nor in spirit. They are to be read in connection with that other provision in this charter, which reserves to the legislature the right to alter, modify, or repeal it. Taking the three provisions together, then we have, first, a prescription on the part of the legislature of the amount which the company shall be required to pay annually; second, a declaration that they shall be required to pay no other tax; and third, a further declaration that the legislature reserves the right to alter this arrangement at its will." (State *v.* Mayor, &c., 31 N. J. Law, 579.)

IV.

So far as these statutes directed or promised action upon the part of the government or its officers, whereby other parties were induced to act in the construction of these roads, and thus constituted whatever element of contract there is in the relation of these parties, it can be no violation of compact to alter or amend these laws if that right was reserved in the original enactments.

In the act of 1862, § 18, it is declared: "And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working-order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." (12 Stats., 497.)

The comprehensive language of the act of 1864, § 20, "that Congress may at any time alter, amend, or repeal this act," has been hereinbefore quoted.

The right reserved under the first act would be quite

sufficient for the present purpose, since the efficiency of the corporation for any of the specified uses of the roads could only be preserved by providing for the solvency of the companies when the debt to the government became payable.

But nothing, practically, was done under that act.. It did not lead to the building of the road. Consequently, the more liberal provisions of the act of 1864 were held out, and they proved a sufficient inducement to capitalists to undertake and complete the enterprise. As the privileges and benefits were so much greater, so the power of amendment, alteration, and repeal was more comprehensive and unlimited.

That the right to amend the statute was absolutely unlimited, it is not necessary to contend.

We can say, in the language of the Massachusetts court, "Perhaps the rule is this, that where, under a power in the charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." (Com. *v.* Essex Co., 13 Gray, 239. See, also, the case of the Commrs. on Inland Fisheries *v.* Holyoke Water-Power Co., 104 Mass., 450, 454, *et seq.*; Parker *v.* Metrop. R. R., 109 Mass., 509.)

The germ of the idea enunciated in the language above quoted from 13 Gray, 239, is found in Fletcher *v.* Peck, 6 Cranch, 135.

The present case is not one of an interference with vested rights. It deprives the corporations of no property, interferes with no proper exercise of corporate privileges. The contract entered into for the repayment of the government advances is not disturbed. The com-

panies are not required to anticipate the time for extinguishing the debts due the United States. They are simply required to furnish security that they will finally perform this agreement. The payments to constitute a sinking-fund are not taken from the company, nor do the moneys so paid belong to the United States, by whose treasurer they are held for safe-keeping simply as a custodian in trust for the companies. The interest earned by this sinking-fund inures wholly to the benefit of the corporations, *because* the funds are theirs.

The law merely requires a deposit of security, just as it is exacted of insurance companies, &c. It is expressly recited in the preamble that this security is demanded, because the companies by their operations and management of their incomes are endangering the interests of the United States, which would be entirely insecure without further legislation. It sets out the precise state of facts which has always been held to justify similar interference with the management of corporations. The existence of these facts is for legislative ascertainment and determination, and is not at all matter of judicial inquiry or cognizance, otherwise than that the court is bound to accept, as an unquestionable verity, that condition of things which the legislature declares to exist. (Crease *v.* Babcock, 23 Pick., 344; Story *v.* Jersy City, &c., Co., 16 N. J. Eq., 22; State *v.* Miller, 30 N. J. Law, 373, affirmed in 31 N. J. L., 521 and 579; Miners' Bank *v.* U. S., 1 Geo. Greene (Iowa), 563, 564; Erie, &c., R. R. *v.* Casey, 26 Penn. St., 300 *et seq.*, per Black, J.)

This requirement of a safety-fund, so far from being in contravention of the design of the acts of 1862 and 1864, is in furtherance of it. Those acts merely contem-

plated a loan, and though it was subject to the prior lien of the first-mortgage bondholders, it was not expected that it should be imperiled by the improvident conduct of the affairs of the corporation. It was based upon the fair presumption of honest and prudent management. When it is perceived that this presumption is not justified by the subsequently occurring facts, Congress may and should intervene to enforce the carrying out of the original expectation. If the companies had instituted a sinking-fund, or provided for the calling in of the prior indebtedness, or otherwise applied their earnings to diminish their obligations, as any careful man, or any corporation which intended to be and keep solvent, would have done, Congress would not have interfered. The country had a vested right to fair dealing, and to honest and prudent management of the affairs of the corporation, to execute the scheme indicated in the early legislation upon this subject.

"The reserved power [to alter and amend] may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of its stockholders and of creditors, and for the proper disposition of the assets." (Miller *v.* State of N. Y., 15 Wallace, 498. See also Tomlinson *v.* Jessup, *Id.*, 454; Peik *v.* N. W. & C. Ry. Co., 94 U. S., 164; C., M. & St. P. Ry. Co. *v.* Ackley, *Id.*, 179; C., B. & Q. R. R. Co. *v.* Iowa, *Id.*, 155; Stone *v.* Wisconsin, *Id.*, 181.)

In railroad, ferry, bridge, and other similar corporations, the inducement to the corporators is evidently the excess (above expenses) of tolls or profits that may accrue to be divided. Any act, subsequent to the charter, cutting down the tariff of rates vitally affects the benefit

to be derived from the act of incorporation, and would impair the obligation of the contract with the State, if that act gave no authority for the reduction, in terms, or by a reservation of the power to amend, &c.

Yet it has been repeatedly held that under the general clause reserving the right to alter and amend, rates established in the organizing act might be reduced, or fixed, if none were there mentioned, or if they were merely required to be reasonable.

The East Boston Ferry Company, incorporated by Massachusetts statute of May 18, 1852, c. 244, § 1, was made "subject to all the liabilities and restrictions set forth in R. S., c. 44," which ingrafted the power to amend upon all charters thereafter issued. Section 2 of the act of May 18, 1852, allowed the company to collect such tolls as the mayor and aldermen might determine, provided the rate should never be fixed so low as to reduce the yearly dividends below 8 per cent. It was established by the mayor, &c., at three cents for each adult and two cents for each child. The legislature by act of 1864, c. 229, § 26, reduced it to one cent per head, and this law was declared to be constitutional. (Parker *v.* Metrop R. R. Co., 109 Mass., 506.)

In Massachusetts, stock life-insurance companies were required to pay one-third of their net profits to the trustees of the general hospital. In 1844, a mutual company was incorporated with the right to pay to those contributing a guarantee capital of $100,000, interest at the rate of 7 per cent. In 1846, an amendatory act was passed which declared that all above 6 per cent. should be deemed "net profits." The hospital trustees sued for their third of net profits, so computed; the defendants contended that the interest paid guarantee stockholders was

to be deemed expense and not profits, and that the law declaring them profits was unconstitutional. The court held it to be a proper exercise of the power to amend. (Mass. Gen. Hosp. *vs.* State Mut. Life Ass. Co., 4 Gray, 227.)

What is the obligation of the contract between these roads and the United States? It is that which the statutes may require by any amendment that may be made touching the subject-matter.

Judge Story remarks: "Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract, then, will consist of that right or power over my will or actions which I, by my contract, confer on another." (2 Story on Const., § 1378.)

The reserved right of amendment to which these corporations assented in advance conferred upon Congress power over their action to such an extent as might be necessary effectually to carry out the original design. The right now exercised, as well as the right of extinguishment by repeal, lay in posse in the statutes of 1862 and 1864. These corporations were conceived and created with a liability to such limitations and modifications as might subsequently be imposed, and to extinction by repeal. "Nascentes morimur, et finis ab origine pendet." (South Meadow Dam. Co. *v.* Gray, 30 Maine, 552, top; Oliver Lee & Co.'s Bk., 21 N. Y., 21; No. R. R. Co. *v.* Miller, 10 Barb., 283, top.)

It was an implication of the original contract that these companies should so conduct their affairs as to be able to make the requisite payment at the maturity of

their debts to the United States (No. R. R. Co. *v.* Miller, 10 Barb., 260); if their management and operations are such as to make it evident to the legislature that a continuance of the same course will render them unable to fulfill this stipulation, there is good reason to interfere.

The question of the existence of such misconduct is frequently remitted to the courts for determination; but here the parties have assented to the clause which subjects it to legislative consideration and decision. Congress may well reserve the right to decide matters that otherwise might become of judicial cognizance. An individual may insert in his contract a clause that work is to be done to his entire satisfaction, or that a house shall be so changed from the plans as to suit his desires, during the progress of the work.

In the case heretofore cited from 4 Gray, Mass. Hospt. Ins. Co. *vs.* State Mut. Ins. Co., the legislature did reserve and exercise, by way of amendment, the right to declare what should be deemed "net profits."

Certainly, under an *express* reservation in the act itself, the United States have the same right as was there exercised under the reservation of a general statute relating to acts of incorporation.

The modification is in execution of the original intention upon this subject-matter. The United States had a right to expect and demand that provision should be made to repay the advances made, when the time for payment should arrive. The preparation must precede the act. For this right the acts prior to this of May 7, 1878, provided no adequate remedy, for it was assumed that the companies would voluntarily perform this duty. As Judge Story says: "The obligation to perform a contract is coeval with the undertaking to perform it.

It originates with the contract itself, and *operates anterior to the time of performance.*"

It is for this reason that a voluntary transfer of property, which must necessarily have the effect to defeat the execution of a contract, is void as to creditors and ground for an adjudication in bankruptcy. For like reasons, many State statutes forbid the declaration of dividends while corporate debts are not provided for. The United States has incorporated but few companies besides the Pacific Railroads and branches and the national banks; and these latter are obliged to deposit United States bonds in the Treasury as security for the payment of certain debts.

It would be competent for any legislature to require a deposit of funds with the State treasurer to meet judgments against railroads doing business in the State, recovered by reason of any mismanagement occasioning injury to person or property in the State.

It is for the legislature to ascertain whether or not the management of railroad companies is such as to demand a new remedy to secure or compel performance of existing obligations.

In the present case, it may be noticed, arguendo, the officers of these two corporations communicated to Congress the fact that, under former laws, they would be unable to pay the claims of the government when they matured, or at all. (See 7 Cong. Rec., pt. ii, p. 1967; and, especially, same vol., pt. iii, p. 2101.)

If there is any right which might fairly be called vested, it would be the privilege of exemption from taxation, especially if conceded upon condition that the State should share all above a given percentage

of the profits; yet, in the case of Hoge, comptroller, *v.* Richm. & Danv. R. R. Co. (No. 134 of the current term), this court say that, where a charter is made subject to amendment, this right of exemption exists only until the legislature may otherwise enact. (Railroad Co. *v.* State of Maine, 96 U. S., 499.)

Possibly the right to use the accepted location of the road for the purposes for which it was made, with its designated stations, &c., may be deemed more essentially and vitally a vested right than that to which allusion has just been made. In Massachusetts, however, certain corporations were required to unite in building a passenger station, to extend their tracks thereto, and thereafter to discontinue a portion of their existing locations. (Worcester *v.* R. R. Cos., 109 Mass., 103.) They were deprived of the right to use their land for the sole purpose for which they were ever permitted to acquire it; they were required to purchase other lands, at great expense, for this purpose, and to put their funds into a common investment with other corporations to erect a structure which they did not want. Yet this court cited this case (109 Mass., 103) with approval in Shields *v.* Ohio (95 U. S., 319, 325), which also see.

This reserved power of amendment has been exercised in the matter of regulating tolls (whether the reservation was expressed in the charter or made by general law a part of every act of incorporation) in almost every State, if not in all; or else similar modifications of the rights first conceded have been held constitutional.

Proprietors, &c., *v.* Haskell, 7 Maine, 474; Read *v.* Frankfort Bk., 23 *Id.*, 318; Meadow Co. *v.* Gray, 30 Maine, 547.

Crease *v.* Babcock, 23 Pick., 334; Roxbury *v.* B. & P.

R. R., 6 Cush., 424; Fitchburg R. R. Co. *v.* Grand Junc. R. R. Co., 4 Allen, 198; Com. *v.* East'n R. R. Co., 103 Mass., 254.

McLarren *v.* Pennington, 1 Paige, 102; Schenectady Co. *v.* Thatcher, 10 N. Y., 102; Buffalo R. R. Co. *v.* Dudley, 14 *Id.*, 336; Oliver Lee & Co., 21 *Id.*, 9; The Reciprocity Bank, 22 *Id.*, 9, and 17 How. Pr., 323; Albany R. R. Co. *v.* Brownell, 24 *Id.*, 345; No. R. R. Co. *v.* Miller, 10 Barb., 260; White *v.* Syracuse R. R. Co., 14 *Id.*, 559; Hyatt *v.* McMahon, 25 *Id.*, 457.

Bailey *v.* Trustees, 6 R. I., 491; Gardner *v.* Hope Ins. Co., 9 *Id.*, 194.

Erie & N. W. R. R. Co. *v.* Casey, 26 Penn. St., 287.

Story *v.* Jersey City, &c. Co., 16 N. J. Eq., 13; State *v.* Miller, 30 N. J. Law, 368, and 31 *Id.*, 521; State *v.* Mayor, *Id.*, 575.

Wilson *v.* Tesson, 12 Ind., 285.

Perrin *v.* Oliver, 1 Minn., 202; Blake *v.* R. R. Co., 19 *Id.*, 418.

Miners' Bk. *v.* U. S., 1 Green (Iowa), 563.

Madison, &c., R. R. Co. *v.* Reynolds, 3 Wis., 287; Pratt *v.* Brown, *Id.*, 603; Kenosha, &c., R. R. Co. *v.* March., 17 *Id.*, 16; Whiting *v.* Sheboygan, &c., R. R. Co., 25 *Id.*, 197; State *v.* Milwaukee Gas Co., 29 *Id.*, 261; West Wisconsin R. R. *v.* Supervisors, 35 *Id.*, 257; Att'y-Gen'l *v.* R. R. Cos., *Id.*, 425, cited infra.

See also Sherman *v.* Smith, 1 Black, 587; Penn. College cases, 13 Wall., 190; Tomlinson *v.* Jessup, Miller *v.* State, and Holyoke *v.* Lyman, 15 Wallace, 454 and 478, and 500, cited ante; Olcott *v.* Supervisors, 16 *Id.*, 678; Perrine *v.* Chesapeake, &c., Canal Co., 9 Howard, 184.

State *v.* Haeflinger, 31 Wis., 262.

The above-cited case of Sherman *v.* Smith, 1 Black,

587, is an affirmance of the decision as to Oliver Lee & Co.'s Bk., 21 N. Y., 9, making stockholders individually responsible for corporate debts, from which the charter exempted them. The charter was subject to amendment. This amendment gave infinitely more security to creditors, and made every stockholder's estate pledged for debts for which it was not previously holden. It greatly affected the value of the stock. So did the change mentioned in Bailey *v.* Hope Ins. Co., 9 R. I., 194, requiring stockholders to fill up reduced capital. The report of Lee's Bank case, 21 N. Y., 9, cites Mass. Hosp. *v.* State Life Ins. Co., 4 Gray, hereinbefore mentioned. Near the commencement of his opinion, Denio, J., says: "The intention was more adequately to protect the creditors of these institutions" (&c., 21 N. Y., 11.) These cases are cited in the beforementioned case of Inland Fisheries *v.* Holyoke Co., 104 Mass., 451, bottom.

V.

There is in this act of 1864 an unrestricted right of repeal. It may be observed, in passing, that the limitation upon this right in Massachusetts is noticed in the case of Com. *v.* Essex Co. (13 Gray, 253, top). The limited right in the act of 1862, § 18, is exchanged for that thus conferred without reserve.

The right to amend may be qualified by judicial construction; but the right to repeal, if exercised, must terminate corporate existence; and this Congress may do at any time. "The power to repeal can bear but one construction." (Att'y-Gen'l *v.* R. R. Cos., 35 Wis., 425.)

Upon such dissolution, the assets are to be applied in liquidation of liabilities, whether matured or not.

If by a repeal Congress could thus obtain security for the moneys advanced, and convert a debt due *in futuro* into one payable *in presenti*, *a fortiori* ought it to be permitted that the desired security should be obtained by the less arbitrary method of amendment. (State *v.* Miller, 30 N. J. L., 373.)

VI.

Hitherto no notice has been taken of the fact that the Central Pacific was originally organized under the laws of California.

It is not perceived that this affects the present case. It is under these Federal statutes (of 1862 and 1864) that the object, "namely, to promote the public interest and welfare by the construction of said railroad and telegraph line," &c., was accomplished. The California corporation accepted the terms of these acts; among others, they acceded to the stipulation that the acts under which they engaged in the enterprise should be subject to amendment, alteration, and repeal; and they must abide the effect of any such action.

The result is not changed by calling the arrangement which was carried out a *contract*, in the form of a statute the provisions of which are accepted. If so, it is, nevertheless, a contract which the parties have agreed should be subject to legislative control and alteration.

After all, the difference is simply this: in the case of the Union Pacific, certain citizens, not before associated, accepted the terms of the act; in the other, gentlemen who had united under a corporate name accepted them. The essential fact is that they were accepted and acted upon, including the right to alter, amend, and repeal. It can make no difference in law whether this provision

was acceded to by individuals or by an already existing legal entity.

The legal existence of a corporation is conterminous with the territorial limits of the sovereignty by which it is created. (O. & M. R. R. Co. *v.* Wheeler, 1 Black, 295.)

In the present instance, the United States, for postal, military, and other important public purposes, connected with and essential to the due performance of sovereign rights and duties, created this corporation (so far as it exists as an entirety, and outside of California, at least), and accepted its services from San Francisco to Ogden; therefore the road, throughout its whole extent, became subject to the acts of Congress which might be passed amendatory of the original charter.

The United States was the sovereign which gave it life as it now exists as a corporation, and which has the correlative right to regulate its conduct, especially as to those matters which solely and peculiarly affect the United States alone.

Without the act of Congress the road could not have condemned lands in the course of its construction, nor exercised the right of taking tolls for conveyance of persons and property across the public domain. California could not give such right outside her own boundaries. Thus only (by Federal legislation) could the line as contemplated be built. The right to charge such tolls is not merely a franchise, but that without which the concession of all others would be useless to such a corporation. (Perrine *v.* Chesapeake &c. Co., 9 Howard, 184; Olcott *v.* Supervisors, 16 Wallace, 678; Blisset *v.* Hart, Willes, 512; Whiting *v.* Sheboygan R. R. Co., 25 Wis., 197; Beekman *v.* Saratoga, &c., R. R. Co., 3 Paige, 75; Olcott *v.* Banfill, 4 N. H., 548; State *v.* B. C. & M. R. R. Co.,

25 Vt., 442; Erie, &c., R. R. Co. *v.* Casey, 26 Penn. St., 287; B. & L. R. R. Co. *v.* S. & L. R. R. Co., 2 Gray, 27; Raritan, &c., R. R. Co. *v* Dela. Canal Co., 18 N. J. Eq., 570; D. L. & W. Ry. Co. *v.* Erie Ry. Co., 21 *Id.* 298; McGregor *v* Erie Ry. Co., 35 N. J. L., 97 (not same case as before cited from that volume between same parties); Blake *v.* R. R. Co., 19 Minn., 418.)

The right to build a railroad is a *franchise*—"a prerogative of *sovereignty*"—(not a mere license.) (Blake *v.* St. Peter, &c., R. R. Co., 19 Minn., 426; Beekman *v.* R. R. Co., 3 Paige, 75; Olcott *v.* Banfill, 4 N. H., 545; State *v.* R. R. Co., 25 Vt., 442, near bottom; 18 N. J. Eq., 570.) "A corporation may have a twofold organization; and be, so far as its relation to our State is concerned, both foreign and domestic. It may have a corporate entity in each State, yet in its general character be of a bifold organization." (McGregor *v.* Erie Ry. Co., 35 N. J. Law, 118, citing cases there said to sustain the doctrine, which is also declared to be sustained upon principle.)

The line was practically useful for all Federal purposes only as an entirety. It was therefore built under Federal laws and auspices. There is no difficulty in holding that a corporation or corporations having identity of name, stockholders, officers, business, and interests may be chartered by different sovereigns, as already stated.

Nor does it make any difference whether these sovereignties are separated from each other by territorial lines or by jurisdictional distinctions. In the latter case it is "as if the line of division was traced by landmarks and monuments visible to the eye." (Taney, C. J., in Ableman *v.* Booth, 21 Howard, 516, middle.)

The United States had the sole right to establish post-roads. It might build a railroad itself for this purpose; or accomplish it by incorporating individuals into a corporation, or by rechartering and enfranchising persons already associated under a corporate name.

Whether it adopted the one course or the other, as to any and all duties or obligations arising under the creative laws, which are made liable to amendment, the party endowed with peculiar privileges for the accomplishment of a governmental purpose would be amenable to Federal legislation.

It was observed by the New York court of appeals: "When the defendant sought and obtained permission of the legislature to continue its line into and transact business in this State, it must be deemed, as to its contracts made here, to possess the powers and be subject to all the liabilities of similar corporations created by this State, as adjudicated by our courts." (Milner *v.* N. Y. & N. H. R. R. Co., 53 N. Y., 307; McGregor *v.* Erie Ry. Co., 35 N. J. Law, 115.)

The Central Pacific Railroad Company *accepted* the benefits and provisions of these acts, including the power of amendment and repeal, and cannot now object to any legitimate exercise of this right. *As to the United States*, this company relinquished all rights (if any it had) inconsistent with this. (Cin., &c., R. R. Co. *v.* Cole, 29 Ohio St., 126.)

"It cannot be permitted to deny the authority of the legislature of the Territory to pass the act in question, after it has availed itself of those provisions contained in the act which are beneficial to it. It must, therefore, be held to have concurred in the alterations of its charter which were made by the act." (M., W. & M. R. R. Co. *v.* Reynolds, 3 Wis., 296, top.)

As already observed, in the present case the consent and concurrence were expressly given in advance. (Story *v.* Jersey City R. R. Co., 16 N. J. Eq., 22; State *v.* Miller, 30 N. J. L., 373, and 31 N. J. L., 571 and 579.)

The case State of N. J. *v.* Yard (95 U. S., 115), and others using same language, are those in which the charter contained no stipulation for any amendment.

As to the consolidation of roads now known as the Central Pacific Railroad Company, it may be said of those roads which have been merged and lost their identity, that they must take the consequence of such action, the prejudicial as well as the beneficial. At any rate, they cannot by their voluntary choice deprive the United States of its right to legislate as to the company which accepted the acts of 1862 and 1864. If the legislation under consideration ought not to extend to any other company, it will not be construed to do so. Its phraseology is apt to govern the conduct of that corporation which owes a duty to the United States under prior statutes.

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